Supreme Court, U.S.
FILED
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In the

Supreme Court of the United States

DAKOTA RURAL ACTION; AND SOUTH DAKOTA RESOURCES COALITION,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC.; et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The citizens of South Dakota by ballot initiative amended their State Constitution to ban, with multiple exceptions, corporate farming and corporate ownership of agricultural real estate. This initiative, Amendment E, grew out of the earlier South Dakota Family Farm Act of 1974 and was modeled upon a provision of the Nebraska Constitution that had withstood judicial scrutiny for fifteen years. Most mid-western states also have some form of prohibition on corporate agriculture, some dating back to the turn of the last century. The Eighth Circuit, without analyzing the text of Amendment E, found that the law had a discriminatory purpose based upon selected statements of supporters and drafters that the court found protectionist. Accordingly, the Eighth Circuit held that Amendment E violated the Dormant Commerce Clause. The questions presented are:

1. Whether a state constitutional amendment dealing with core health and welfare issues that is both historically grounded and facially valid can be struck down under the Dormant Commerce Clause on the basis of protectionist rhetoric of some supporters.

2. Whether a state has the power to restrict corporations from engaging in agriculture in that state without violating the Dormant Commerce Clause.

PARTIES TO THE PROCEEDING

The following are the parties to the proceeding below:

The South Dakota Secretary of State
The South Dakota Attorney General
South Dakota Farm Bureau, Inc.
South Dakota Sheep Growers Association, Inc.
Haverhals Feedlot, Inc.
Sjoval Feedyard, Inc.
Frank D. Brost
Donald Tesch
William Aeschlimann
Spear H. Ranch
Marston Holben
Marston and Marian Holben FamilyTrust
Montana-Dakota Utilities Company
Northwestern Public Service Company
Otter Tail Power Company
Dakota Rural Action
South Dakota Resources Coalition

CORPORATE DISCLOSURE STATEMENT

Petitioners Dakota Rural Action and South Dakota Resources Coalition are non-profit corporations established under South Dakota law. There are no parent or publicly held corporations holding more than ten percent of their stock.

TABLE OF CONTENTS

pages

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 5

I. A state constitutional amendment dealing with core health and welfare issues that is both historically grounded and facially valid cannot be struck down under the Dormant Commerce Clause solely on the basis of protectionist rhetoric of some supporters 5

II. A state has the power to restrict corporations from engaging in agriculture in that state without violating the Dormant Commerce Clause 10

CONCLUSION 15

APPENDIX

CIRCUIT COURT DECISION 1a

DISTRICT COURT DECISION 30a

CIRCUIT COURT ORDER DENYING REHEARING 95a

CIRCUIT COURT OPINION 96a

SOUTH DAKOTA CONSTITUTION, ARTICLE XVII, §§ 21 THROUGH 24 ..... 97a

TABLE OF AUTHORITIES

pages

Cases

ASBURY HOSPITAL v. CASS COUNTY, N.D., ET AL., 326 U.S. 207 (1945) 7, 12

BRASWELL v. UNITED STATES, 487 U.S. 99 (1988) 13

COMMERCE CLAUSE. EXXON CORP. v. GOVERNOR OF MARYLAND, 437 U.S. 117 (1978) 11

DANIEL v. FAMILY SEC. LIFE INS. CO., 336 U.S. 220 (1949) 9

HELLER v. DOE BY DOE, 509 U.S. 312 (1993) 8

F.T.C. v. SIMPLICITY PATTERN CO., 360 U.S. 55 (1959) 8

FERGUSON v. SKRUPA, 372 U.S. 726, 729 (1963) 8

HAMPTON FEEDLOT v. NIXON, 249 F. 3D 814 (8TH. CIR. 2001) 10

HORN SILVER MINING CO. v. NEW YORK, 143 U.S. 305 (1892) 12

KAMEN v. KEMPER FIN. SERVS., 500 U.S. 90 (1991) 13

M.S.M. FARMS INC. v. SPIRE, 927 F. 2D 330 (8TH CIR. 1991) 7, 12

MINNESOTA V. CLOVER LEAF CREAMERY CO., 449 U.S. 456 (1981) 9

OMAHA NATIONAL BANK V. SPIRE, 389 N.W.2D 269 (NEB. 1986) 12

PERRY V. COMMERCE LOAN CO., 383 U.S. 392, 400 (1966) 9

STATE EX. REL. WEBSTER V. LEHNDORFF GENEVA, INC., 744 S.W. 2D 801 (MO. 1988) 7, 12

STATE OF OKLAHOMA EX REL. PHILLIPS V. GUY F. ATKINSON CO., 313 U.S. 508 (1941) 8

VIRGINIA BANKSHARES V. SANDBERG, 501 U.S. 1083 (1991) 12

Statutes and Constitutional Provisions

25 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 2

42 U.S.C. § 2101 ..... 2, 5, 6

59 UMKC L. Rev. 679 8

Iowa Code, Ch. 9 6

Kan. Stat. Ann. § 17-59-4 6

Minn. Stat. Ann. § 500.24 6

Mo. Rev. Stat. 350.015 6

N.D. Cent. Code §§10-06.1-01 - 27 6

Neb. Const. Art. XII, §8 6

Okla. Const. Art. XXII, §2 6

Okla. Stat. Ann. Tit. 18 §951 6

South Dakota Constitution, Article XVII,
Sections 21 through 24 1

Wisc. Stat. Ann. §182.001 6

The petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-29) is reported at 340 F.3d 583. The decision of the United States District Court for the District of South Dakota (App. 30-94) is reported at 202 F. Supp. 2d 1020 (D.S.D. 2002).

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2003. A timely petition for rehearing was denied on October 31, 2003. App. 95. The jurisdiction of this Court is invoked under 25 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The negative aspect of the commerce clause, United States Constitution, Article I, Section 8, Clause 3, is involved. It provides that "The Congress shall have power . . . To regulate commerce . . . among the several states."

The state constitutional provisions at issue are South Dakota Constitution, Article XVII, Sections 21 through 24. App. 97-101.

STATEMENT

1. Trial Court Proceedings: United States District Court for the District of South Dakota. Thirteen entities, including South Dakota trade associations, several individuals, and three utilities, challenged Amendment E by filing suit in District Court. The action was filed under 42 U.S.C. § 1983 (dormant Commerce Clause and Fourteenth Amendment claims), and 42 U.S.C. § 2101 et seq. (Americans with Disabilities Act ("ADA") claim). The utilities claimed that, as corporations, they would violate Amendment E if they purchased easements for utility transmission lines or if they held agricultural property pending development of a new power plant. The South Dakota Farm Bureau claimed that Amendment E discriminated against its disabled members and therefore violated the ADA, a claim they dropped early in the litigation. The remaining plaintiffs generally challenged Amendment E under the dormant Commerce Clause, claiming that South Dakota farmers who do business on an interstate business are harmed by Amendment E.

At trial, several defense experts testified regarding various academic and governmental studies and reports showing that corporate farming is detrimental to family farmers and rural communities in terms of social well-being, health, and the environment. The District Court found that Amendment E was unconstitutional under the dormant Commerce Clause in that it impaired utilities from holding necessary agricultural property for use in delivering interstate electric services. App. 91-93. Also, the District Court renewed the ADA claim that had previously been

dropped. The District Court held that the ADA preempted Amendment E and that Amendment E was therefore invalid.

2. Eighth Circuit Court of Appeals .The Eighth Circuit reversed the District Court's holding that the ADA preempted Amendment E, but affirmed the District Court's judgment that Amendment E violated the dormant Commerce Clause, albeit for different reasons. The court concluded, without analyzing the wording of Amendment E or its effects, that it was enacted for a discriminatory purpose and does not satisfy strict scrutiny.

In reaching that conclusion, the Eighth Circuit principally focused on the intentions of the drafters of Amendment E. The court pointed to minutes of drafting committee meetings, at which individuals expressed their desire to keep two large out-of-state hog feeding businesses -- Murphy Farms, Inc. (a North Carolina subsidiary of packer Smithfield Foods, Inc) and Tyson Foods, Inc. (an Arkansas corporation) -- from operating in South Dakota. App. 19- 20. The court also found the failure of certain individual drafters to know the environmental and economic effects of current laws and Amendment E, their failure to commission their own studies on those issues, and their purported haste in drafting the Amendment to be probative of discriminatory intent. App. 20 –22.

In addition, the Eighth Circuit pointed to the "Pro" statement contained within the pamphlet published by the South Dakota Secretary of State as "brimming with protectionist rhetoric" and, therefore, containing evidence of discrimination "as regards the

drafters." App. 19. The court pointed to two passages in the "Pro" statement: that "[d]esperately needed profits will be skimmed out of local economies and into pockets of distant corporations"; and that "the opportunity to decide whether control of our state agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few large corporations." App. 19. The court did not mention the passages of the "Pro" statement that discussed the general interest in preserving the traditional way of life embodied by family farming or that mentioned the environmental justification for the Amendment. The court of appeals held that these public and private documents, read together, show a discriminatory intent against out-of-state corporations on the part of the drafters.

The Eighth Circuit then applied strict scrutiny to Amendment E, holding that "we must strike it down as unconstitutional unless the Defendants can demonstrate that they have no other method by which to advance their legitimate local interests." App. 25. The court acknowledged the legitimacy of the interests proffered by the state, "the promotion of family farms and the protection of the environment." App. 25. But, held the court, there may be "reasonable non-discriminatory alternatives" that advance those interests. App. 25. The court found that, "[a]lthough the record contains evidence linking industrial farming with poverty and environmental problems, it contains no evidence that suggests, evaluates, or critiques alternative solutions." App. 26.

The court therefore affirmed the order of the District Court enjoining the enforcement of Amendment E.

REASONS FOR GRANTING THE WRIT

I. A state constitutional amendment dealing with core health and welfare issues that is both historically grounded and facially valid cannot be struck down under the Dormant Commerce Clause solely on the basis of protectionist rhetoric of some supporters.

Reading the Eighth Circuit's opinion, one gets the decidedly mistaken impression that the drafters created Amendment E out of whole cloth to discriminate against out-of-state corporations. The Eighth Circuit does not analyze the text of Amendment E and the decision completely ignores the long tradition of similar legislation in South Dakota and throughout the Midwest. The drafters of Amendment E were following in the footsteps of legislators and citizens of South Dakota and eight other mid-western states, where such anti-corporate farming statutes have a long history and have previously survived all legal challenges.

Amendment E is an outgrowth of South Dakota's earlier Family Farm Act of 1974, S.D. Compiled Laws Ann. §§ 47-9A-1 through 23. In enacting the Family Farm Act of 1974, the South Dakota Legislature recognized "the importance of the farm to the economic and moral stability of the state, ... and that the family farm is threatened by conglomerates in farming." Id. § 47-9A-1. The Family

Farm Act of 1974 bore many similarities to Amendment E, including a ban on corporate farming or acquisition of farm real estate, Id. § 47-9A-3, and an exception for family farm corporations where at least one stockholder resided on or actively engaged in the operation of the farm. Id. § 47-9A-14.

The South Dakota Family Farm Act was patterned after the Minnesota statute, Minn. Stat. Ann. §500.24, which was adopted in 1973 and became the pattern for statutes developed in Missouri and Iowa as well. The stated purpose of the Minnesota statute was "... that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well being of rural society in Minnesota and the nuclear family."

Amendment E is similar to the statutory or constitutional provisions of eight other mid-western states. (N.D. Cent. Code §§10-06.1-01 – 27; Neb. Const. Art. XII, §8; Kan. Stat. Ann. §17-59-4; Okla. Const. Art. XXII, §2; Okla. Stat. Ann. Tit. 18 §951; Wisc. Stat. Ann. §182.001; Minn. Stat. Ann. §500.24; Iowa Code, Ch. 9H1-9H15; Mo. Rev. Stat. 350.015.) The laws date back as far as 1907 in Oklahoma, when the constitution was adopted in the state. One of the first legal challenges to these type of laws arose out of North Dakota's initial Anti-Corporate Farming Act of 1932, which prohibited all corporations from engaging in farming or owning agricultural real estate. The United States Supreme Court held that it is a well settled principle that the Fourteenth Amendment does not deny a state the power to exclude a foreign corporation from doing

business or acquiring property within the state. *Asbury Hospital v. Cass County, N.D., et al.*, 326 U.S. 207 (1945). Missouri's prohibition against corporate farming was passed in 1975 and was upheld against due process and equal protection challenges in *State Ex. Rel. Webster v. Lehndorff Geneva, Inc., 744 S.W. 2d 801* (Mo. 1988).

As noted by the trial court, Amendment E is remarkably similar to the Nebraska constitutional provision, and the drafters of Amendment E essentially modeled the Amendment after the Nebraska provision. In 1982, Nebraska voters adopted Article XII § 8 of the Nebraska Constitution through the initiative and referendum process. Nebraska's constitutional prohibition of corporate farming and ownership of real estate was upheld against a due process and equal protection challenge in *M.S.M. Farms Inc. v. Spire*, 927 F. 2d 330 (8th Cir. 1991). The Eighth Circuit in that case rejected the equal protection challenge, finding that the Equal Protection Clause was satisfied when the law adopted was rationally related to a legitimate state interest. The Court found that the people of Nebraska made a reasonable judgment that prohibiting non-family corporate farming served the public interest in preserving an agricultural system where families own and farm the land.

It is therefore not logical to find that the drafters of Amendment E were driven by a discriminatory purpose when they modeled the Amendment after the Nebraska law that had been in existence for over fifteen years, had withstood legal challenge, and had been found by the Eighth Circuit to be a reasonable judgment by Nebraska voters. Further, other such

laws had existed for many years and had survived all scrutiny.

Regarding the various constitutional challenges to these laws that preceded Amendment E, one commentator noted "it appears settled that the Acts are constitutional." Stayton, *A Legislative Experiment in Rural Culture: The Anti- Corporate Farming Statutes*, 59 UMKC L. Rev. 679, 1991. More specifically, in addressing Commerce Clause concerns relating to these Acts, another commentator has validly stated: "The principles of Federalism also support the proposition that the laws should be sustained. If national interest override these local interests, Congress can correct the situation through national legislation. Judicial correction can be accomplished only if a serious burden on commerce becomes sufficiently clear." Morrison, *State Corporate Farm Legislation*, 7 Toledo L. Rev. 961, 1976.

In striking down Amendment E, the Eighth Circuit failed to give due regard to the applicable principles of constitutional interpretation and failed to give proper deference to the text of the Amendment and the voters of South Dakota. There is a strong presumption that all regularly enacted statutes are constitutional. *Heller v. Doe by Doe*, 509 U.S. 312 (1993). The wisdom and utility of an act is a matter solely of legislative and political concern, and not for judicial consideration. *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). Questions of public policy are for determination by the legislature or voters, and not for the courts. *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

Given a presumption in favor of legislative good faith, if a statute appears on its face to be constitutional and valid, courts will not inquire into the motives of the legislature. *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949). It stands to reason that such principles should be extended to the direct democratic process of a citizen initiative to amend the state constitution. In interpreting the purpose of laws, courts are not to go beyond the language of the law itself if the language is clear. As this Court has stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966).

The Eighth Circuit put undue weight on the fact that some supporters of Amendment E might have used protectionist rhetoric in its drafting or to obtain its passage. Conceptually, however, this case is almost identical to the situation in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). There, a state statute dealing with health and welfare issues was also promoted by some legislators because of its benefit to the state's industry. However, this Court held that it would not invalidate a law merely because some supporters of the measure obtained votes based on its beneficial side effects to state industry. *Clover Leaf Creamery*, 449 U.S. at 462 , n. 7.

Further, Amendment E is facially neutral and does not have a clear discriminatory purpose or effect. It treats in state and out of state entities equally, and offers no protectionist advantage to South Dakota

entities. In addition, Amendment E only regulates within the State of South Dakota and has no extraterritorial reach or impact. In this respect, Amendment E is quite similar to the Missouri livestock price discrimination law recently upheld against a Commerce Clause challenge in *Hampton Feedlot v. Nixon*, 249 F. 3d 814 (8th. Cir. 2001). In that case, the Eighth Circuit found that Missouri's livestock price discrimination law did not discriminate between in-state and out-of state packers or producers, nor did it attempt to regulate out-of-state commerce, and thus did not burden interstate commerce. Thus, the Eighth Circuit's decision in the instant case is in conflict both with prior Eighth Circuit and United States Supreme Court precedent.

Finally, to term the statements of the supporters and drafters of Amendment E as protectionist is both an overstatement and misleading. All such statements were proper political dialogue that honestly and accurately addressed crucial health and welfare issues facing the citizens of South Dakota. To allow the Eighth Circuits opinion to stand will hopelessly cripple legitimate political debate, and will lead to the absurd result that the statements of a handful of individuals can be twisted to thwart the will of the voters of a state.

II. A state has the power to restrict corporations from engaging in agriculture in that state without violating the Dormant Commerce Clause.

It was well within South Dakota's prerogative to protect its environment and way of life by regulating

corporate ownership of farms and agricultural land. Amendment E is designed to take away competitive advantages and protections for non-family farm entities so that small, family farmers are not forced to compete against larger, corporate establishments with their liability protection and tax advantages. This purpose is not a ruse to ban out-of-state competition. It makes no difference to the family farmer whether the corporate factory farms are owned by in-state or out-of-state corporations.

A statute that merely may cause a shift in the nature of entities engaging in interstate commerce does not constitute an impermissible burden and does not violate the Commerce Clause. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). In *Exxon*, Maryland had enacted a statute prohibiting petroleum producers or refiners from operating retail service stations within the State. Further, there were no local producers or refiners, all were out-of state. The Court upheld the statute against a Commerce Clause challenge, holding that interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another. The underlying principle is that the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.

In the instant case, Amendment E does not prohibit citizens of other states from engaging in farming or owning agricultural real estate in South Dakota, so long as they do not do so as non-family, corporate farms. Thus, under *Exxon*, the purported discrimination found by the panel is not of the type that

violates the Commerce Clause, as any citizen of any U.S. State can participate in the market. The fact that there may be a shift in the nature of the business entities is not violative of the Commerce Clause.

The U.S. Supreme Court has repeatedly held that a State possesses the plenary authority to control foreign corporations, and that the State's police power enables it to regulate corporate involvement in farming. *Asbury Hospital v. Cass County*, N.D., 326 U.S. 207 (1945). Thus, the United States Supreme Court has ruled that a state's power to control foreign corporations is plenary, and that this police power of the state cannot be curtailed even over corporations that have acquired property within the state. Such is the basis of well-settled law that extends back to the early jurisprudence of this nation. *Horn Silver Mining Co. v. New York*, 143 U.S. 305 (1892). As noted above, laws specifically prohibiting corporate involvement in farming have been upheld by courts in several other jurisdictions which have repeatedly reaffirmed the axiomatic principle that states have plenary power to define, control, and regulate foreign corporations. *See State ex rel. Webster v. Lehndorff Geneva*, 744 S.W. 2d 801 (Mo. 1988) (en banc); *Omaha National Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986); *MSM Farms v. Spire*, 927 F.2d 330 (8th Cir. 1991); *cert. denied*, 501 U.S. 814 (1991).

Underlying these affirmations of the plenary power of the state over foreign corporations is the bedrock legal principle that corporations are creations of the state - a well-settled principle repeatedly reaffirmed by the U.S. Supreme Court. *See Virginia Bankshares v. Sandberg*, 501 U.S. 1083 (1991); *Kamen*

v. Kemper Fin. Servs., 500 U.S. 90 (1991); *Braswell v. United States*, 487 U.S. 99 (1988). As such, corporations possess certain state advantages and privileges not enjoyed by other forms of business. Those privileges confer advantages upon the corporate form of business not accorded to individuals, and thus may enable the corporation to unfairly compete with unincorporated businesses.

A fair reading of Amendment E in the context of the evidence at trial establishes that Amendment E attempts to turn the tide on the adverse social, economic, and environmental impacts imposed on rural communities by non-family, corporate farms. Limited liability entities enjoy limited risk exposure and tax advantages which allow them to attract investment capital with which to expand. This creates anti-competitive forces that squeeze traditional, family farmers out of the market. The inability of the family farmer to compete changes social demographics in rural communities by replacing the independent farmer with disempowered sharecroppers and destroys the social fabric of small towns.

In addition, Amendment E aims to make farm owners responsible for environmental contamination. Large agribusiness, such as hog operations, have a propensity to produce an enormous amount of waste that saturates soil, deluges water channels, and contaminates groundwater. Corporate limited liability status allows owners of agricultural operations to avoid personal liability for environmental contamination. Accordingly, Amendment E seeks to limit the availability of reduced risk exposure provided by corporate status to family farmers who are personally

involved in the farming operation. Family farmers, even if they do enjoy limited liability due to corporate organization, are exempt under Amendment E due to their obvious disincentive to "foul their own nest."

If allowed to stand, the ruling in this case would thus completely alter the current relationship between corporations and State governments. It would pervert Commerce Clause jurisprudence to judicially empower foreign corporations to wield dormant Commerce Clause doctrine to strike down any state law that controls corporate involvement in a particular industry. Such a result simply is not consistent with the nature and identity of corporations as public entities chartered by state governments.

Finally, the decision of the Eighth Circuit in this case will have a deleterious impact on the ability of states to react to and legislate against problems that arise first in other states. In the instant case, it was merely chance that the problems sought to be addressed by the drafters had arisen in other states and with non South Dakota corporations. It does not make sense that citizens of a state must first wait until the damaging companies have located in their state to take action, lest they be accused of having a discriminatory purpose.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 02-2366, No. 02-2588, No. 02-2644, No. 02-2646

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

South Dakota Farm Bureau, Inc.; South Dakota Sheep Growers Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Frank D. Brost; Donald Tesch; William A. Aeschlimann; Spear H. Ranch, Inc.; Marston Holben; Marston and Marian Holben Family Trust; Montana-Dakota Utilities Company; Northwestern Public Service; Otter Tail Power Company,
Plaintiffs - Appellees,

v.

Joyce Hazeltine, in her official capacity as Secretary of State of South Dakota ; Mark W. Barnett, in his official capacity as Attorney General of South Dakota,
Defendants - Appellants,

Dakota Rural Action; South Dakota Resources Coalition, Intervenors Defendants, State of Nebraska ; Everett Holstein; Rudy Meduna; Dan Hodges,
Amicus on Behalf of Appellants,

The American Farm Bureau Federation; Alabama Farm Bureau Federation; Arkansas Farm Bureau Federation; Kansas Farm Bureau Federation; Kentucky Farm Bureau Federation; Minnesota Farm Bureau Federation; North Dakota Farm Bureau Federation; Utah Farm Bureau Federation,
Amicus on Behalf of Appellees.

South Dakota Farm Bureau, Inc.; South Dakota Sheep Growers Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Frank D. Brost; Donald Tesch; William A. Aeschlimann; Spear H. Ranch, Inc.; Marston Holben; Marston and Marian Holben Family Trust; Montana-Dakota Utilities Company; Northwestern Public Service; Otter Tail Power Company,
Plaintiffs - Appellees,

v.

Joyce Hazeltine, in her official capacity as Secretary of State of South Dakota ; Mark W. Barnett, in his official capacity as Attorney General of South Dakota,
Defendants,

Dakota Rural Action; South Dakota Resources Coalition,
Intervenors Defendants - Appellants,

Everett Holstein; Rudy Meduna; Dan Hodges,
Amicus on Behalf of Appellants.

South Dakota Farm Bureau, Inc.; South Dakota Sheep Growers Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Frank D. Brost; Donald Tesch; William A. Aeschlimann, Plaintiffs, Spear H. Ranch, Inc.; Marston Holben; Marston and Marian Holben Family Trust,
Plaintiffs - Appellants,

Montana-Dakota Utilities Company; Northwestern Public Service; Otter Tail Power Company,
Plaintiffs,

v.

Joyce Hazeltine, in her official capacity as Secretary of State of South Dakota; Mark W. Barnett, in his official capacity as Attorney General of South Dakota,
Defendants - Appellees,

Dakota Rural Action; South Dakota Resources Coalition,
Intervenors Defendants - Appellees.

South Dakota Farm Bureau, Inc.; South Dakota Sheep Growers Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Frank D. Brost; Donald Tesch; William A. Aeschlimann,
Plaintiffs - Appellants,

Spear H. Ranch, Inc.; Marston Holben; Marston and Marian Holben Family Trust; Montana-Dakota Utilities Company; Northwestern Public Service; Otter Tail Power Company,
Plaintiffs,

v.

Joyce Hazeltine, in her official capacity as Secretary of State of South Dakota; Mark W. Barnett, in his official capacity as Attorney General of South Dakota,
Defendants - Appellees,

Dakota Rural Action; South Dakota Resources Coalition,
Intervenors Defendants - Appellees.

February 10, 2003, Submitted
August 19, 2003, Filed

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JUDGES: Before BOWMAN, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

OPINIONBY: BOWMAN

OPINION: BOWMAN, Circuit Judge.

The South Dakota Constitution prohibits corporations and syndicates, subject to certain exemptions, from acquiring or obtaining an interest in land used for

farming and from otherwise engaging in farming in South Dakota. This restriction, known as Amendment E, was added to the South Dakota Constitution as the result of a 1998 referendum. The thirteen Plaintiffs in this case allege that Amendment E violates the dormant Commerce Clause of the United States Constitution, and a smaller group of these Plaintiffs also claims that it violates the Americans with Disabilities Act (ADA).

Prior to trial, the District Court dismissed the ADA claim, and the Plaintiffs amended their complaint to delete that claim. After a bench trial, but prior to issuing its opinion, the District Court sent a memorandum to all parties stating that it erred in dismissing the ADA claim before trial. In its opinion, the District Court concluded that Amendment E violates both the ADA and the dormant Commerce Clause, and it enjoined Defendants Joyce Hazeltine, the South Dakota secretary of state, and Mark Barnett, the State's attorney general, from enforcing Amendment E. S.D. Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, 202 F. Supp. 2d 1020 (D.S.D. 2002). Hazeltine and Barnett appeal, as do two parties that intervened on the side of the Defendants, Dakota Rural Action and South Dakota Resources Council.

We conclude that the District Court improperly considered the ADA claim, but we affirm its judgment by concluding that Amendment E contravenes the dormant Commerce Clause.

I.

Amendment E was codified as four sections of Article

XVII of the South Dakota Constitution. Section 21, the prohibitory provision, states that "no corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." S.D. Const. art. XVII, § 21. A corporation or syndicate can avoid the prohibition of § 21 if it fits within one of fifteen exempted categories listed in § 22, five of which are relevant to the issues raised on appeal.

The first of these relevant exemptions is for a "family farm corporation or syndicate," which is defined asa corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another within the fourth degree of kinship according to civil law, or their spouses. At least one of the family members in a family farm corporation or syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration.Id. § 22, cl. 1. The ADA claim in this case is based on the inability of physically disabled farmers and ranchers to qualify for this exemption.

The second relevant exemption in § 22 applies to land and livestock in which a cooperative has a legal interest, so long as the cooperative fulfills certain prerequisites related to family ownership. n1 Id. cl. 2. As the District Court noted, this is a curious exemption because § 21, by its own terms, applies only to

"corporations and syndicates" and not specifically to cooperatives.

Amendment E also contains an exemption known as a "grandfather clause" that applies to interests in agricultural land owned by corporations and syndicates as of the effective date of Amendment E. Id. cl. 4. Section 22 has a similar provision for livestock that corporations and syndicates owned as of the effective date of Amendment E. Id. cl. 5. The final exemption of note is for corporations or syndicates that acquire or lease agricultural land for immediate or potential non-farming purposes. Id. cl. 10.

II.

Thirteen parties, to whom we will refer collectively as "the Plaintiffs," challenge the legality of Amendment E. Two of the Plaintiffs are South Dakota corporations: Haverhals Feedlot, Inc. (HFI), and Sjovall Feedyard, Inc. (SFI). Each owns a custom cattle feedlot, which means that they raise cattle owned by third parties. The third parties deliver cattle to the feedlots but retain ownership of the cattle. The feedlots then raise the cattle in preparation for slaughter. HFI and SFI claim that § 21 prohibits corporations who own cattle from contracting with South Dakota feedlots because the corporations would be engaging in farming in South Dakota. In short, these two Plaintiffs claim that Amendment E--if enforced--would put them out of business because they earn their revenue from feeding cattle owned by non-exempt entities.

Plaintiffs Donald Tesch and William Aeschlimann engage in unincorporated livestock feeding businesses

in South Dakota. Tesch is in the seventh year of a ten-year contract to raise hogs for Harvest States Cooperative, which is based in Minnesota. Although the hogs Tesch is raising under this contract are exempted by Amendment E's grandfather clause for livestock, Tesch claims that § 21 bars Harvest States from engaging in farming in South Dakota and, therefore, from entering into a subsequent contract with him. As for Aeschlimann, he feeds lambs owned by third parties, many of whom are non-exempt corporations pursuant to Amendment E. He thus claims that Amendment E will drastically reduce his income because it prohibits the non-exempt entities from contracting with him.

Spear H Ranch (Spear H), another corporate Plaintiff, is an Arizona corporation that does business in South Dakota, operating a cattle ranch. Its sole shareholder is the Marston and Marian Holben Family Trust, which is also a Plaintiff, as is Marston Holben individually. Spear H, the Holben Trust, and Holben claim that Amendment E prohibits Spear H from acquiring additional land in South Dakota and farming it because, aside from the grandfather clause, Spear H does not fit into any of § 22's exemptions. Specifically, the family farm exemption of § 22(1) cannot apply because the Holbens do not reside or work on the ranch.

Plaintiff Frank Brost is the majority or sole stakeholder in three entities, none of which are Plaintiffs, that own ranch land and livestock in South Dakota. The grandfather clause of Amendment E permits these entities to continue using the land they owned as of Amendment E's effective date, but Brost reads § 21 to prohibit them from owning additional land and from

engaging in additional farming. Because Brost does not live on the ranch land, nor do any of his family members, he believes that the family farm corporation exemption of § 22(1) would not apply to his three businesses. In addition, Brost individually owns ranch land, and he claims that Amendment E has diminished the value of the land because its most likely purchasers are corporations that cannot acquire the land under Amendment E.

Two interest groups, on behalf of their members, have also joined as Plaintiffs. The first is the South Dakota Farm Bureau (SDFB), which represents the interests of farm, ranch, and rural families in South Dakota. It claims that Amendment E has damaged its members by prohibiting their limited liability entities from farming in South Dakota and by effectively preventing them from contracting with corporations and syndicates. The South Dakota Sheep Growers' Association similarly claims that many of its members cannot farm in corporate form or contract with certain entities.

The final three Plaintiffs are utility companies that claim Amendment E applies to, and increases the cost of, easements they must acquire for a power plant.

On the other side, two not-for-profit groups--Dakota Rural Action (DRA), which represents the interests of family farmers, and South Dakota Resources Council (SDRC), which advocates protection of the environment--intervened permissively, joining the South Dakota secretary of state and attorney general as Defendants. DRA and SDRC were both heavily involved in drafting Amendment E and promoting it

during the campaign leading up to the referendum. We will refer to Hazeltine and Barnett as "the State Officials," to DRA and SDRC as "the Intervenors," and to all four parties collectively as "the Defendants." n2

III.

We first consider the ADA claim initially advanced only by SDFB, but later joined by Plaintiffs Brost and Holben. The family farm corporation exemption in § 22(1) requires a family member to reside on a farm or engage in "both daily or routine substantial physical exertion and administration." S.D. Const. art. XVII, § 22, cl. 1. The rationale supporting the ADA claim is that Amendment E discriminates against disabled farmers, such as Brost and Holben, whose corporations can not qualify for this exemption because their owners are physically unable to participate in the daily labor and management of the land.

Eleven months before trial, the Defendants successfully moved to dismiss the ADA claim on the basis that a plaintiff cannot seek prospective injunctive relief for ADA claims from state officials in their official capacities. Hr'g Tr. at 5-6 (Jan. 18, 2000). The Plaintiffs then amended their complaint to remove the ADA claim. There was no mention of the ADA claim during the pre-trial conference or during the trial, which took place from December 3-7, 2001. On December 12, before the District Court issued its opinion, the District Court sent a memorandum to the parties explaining that, at the time of trial, it "was somewhat behind in [its] reading" of Eighth Circuit case law. Dist. Ct. Mem. to Counsel (Dec. 12, 2001). The District Court wrote that, on November 6, 2001, we concluded in Grey v. Wilburn,

270 F.3d 607, 609 (8th Cir. 2001), that a plaintiff can indeed request prospective injunctive relief for ADA violations from state officials in their official capacities. n3 The District Court wrote in its December 12 memorandum that its decision to dismiss the ADA claim was incorrect pursuant to Grey, and it directed the parties to "keep this in mind as you submit further arguments." Dist. Ct. Mem. to Counsel (Dec. 12, 2001).

On the basis of Grey, the District Court reconsidered the ADA claim and concluded that Amendment E violated the ADA. The Court explained its decision to rule on the ADA claim as proper because Brost and Holben submitted ADA claims as offers of proof at trial: they testified that they are unable to engage in strenuous ranching activities. Trial Tr. at 66, 255. The Defendants argue that the District Court abused its discretion by reinstating the ADA claim, while the Plaintiffs defend the District Court's sua sponte revival of the claim as a proper decision to conform the pleadings to the evidence at trial. See Fed. R. Civ. P. 15(b). The pleadings may only be amended when issues not in the pleadings are tried by the parties' "express or implied consent." Id. In order to consent to the trial of an unpleaded issue, a party must have notice of that issue and must have been given adequate opportunity to cure any surprise caused by the amendment to the pleadings. Kim v. Nash Finch Co., 123 F.3d 1046, 1063 (8th Cir. 1997). We review a district court's decision to conform the pleadings to the evidence for an abuse of discretion. Clark v. Martinez, 295 F.3d 809, 815 (8th Cir. 2002).

The record contains no evidence that the Defendants expressly consented to the trial of the ADA claim, and

we do not believe there is enough evidence to satisfy the demanding standard for implied consent. See Triad Elec. & Controls, Inc. v. Power Sys. Eng'g, Inc., 117 F.3d 180, 193 (5th Cir. 1997) (stating that "trial of unpled issues by implied consent is not lightly to be inferred under Rule 15(b)" (citation to quoted case omitted)). The offers of proof concerning the respective states of health of Brost and Holben cannot be considered notice to the Defendants that the ADA claim was being tried; the purpose of the offers of proof was never stated, and there is simply no basis for us to conclude that the Defendants impliedly consented to the trial of the ADA claim. It is significant to us that the District Court had dismissed the ADA claim and that the Plaintiffs deleted the ADA claim from their complaint; if the Defendants had any notice of the ADA claim, their notice was that the District Court would not permit the claim to be heard and that the Plaintiffs had no intent to try it. Moreover, the ADA was never discussed during trial. Without notice, the Defendants lacked an adequate opportunity to cure the surprise caused by the District Court's constructive amendment to the pleadings: they could not present evidence or cross-examine witnesses concerning any issue, factual or legal, related to the claim.

The Plaintiffs argue that the Defendants had an opportunity to cure the surprise because the District Court instructed the parties to address a potential ADA claim in their post-trial briefs. The purpose of Rule 15(b), however, is to ensure that the pleadings do not obstruct a court's ability to address the issues that were presented and defended at trial. In this case, the ADA claim was never presented or defended at trial, so it is immaterial that the Defendants could defend the

ADA claim in their post-trial briefs. We conclude that the District Court abused its discretion in constructively amending the pleadings to include the ADA claim. The judgment cannot stand insofar as it is based on that claim. n4

IV.

Before we turn to the dormant Commerce Clause claim, we must first address the State Officials' argument that the Plaintiffs lack standing to raise this claim. We "are under an independent obligation to examine [our] own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990) (quoting Allen v. Wright, 468 U.S. 737, 750, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984)) (first alteration by this Court). If a plaintiff lacks standing, a court is without subject matter jurisdiction. Faibisch v. Univ. of Minn., 304 F.3d 797, 801 (8th Cir. 2002). Whether a court has subject matter jurisdiction is an issue that any party or the court may raise at any time. Fromm v. Comm'n of Veterans Affairs, 220 F.3d 887, 890 (8th Cir. 2000).

To establish standing, a plaintiff must show three things. "First, the plaintiff must have suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (internal quotation marks and citations to quoted cases omitted). Second, the injury must be traceable to the defendant's challenged action. Id. Third, it must be "likely" rather than "speculative" that

a favorable decision will redress the injury. Id. at 561. The standing challenge in this case concerns the first element: whether any of the Plaintiffs have suffered an injury in fact.

The Defendants insist that HFI, SFI, Tesch, and Aeschlimann lack standing because the prohibitions of § 21 apply only to their contracting partners. A third party does not have standing to assert "the rights or legal interests of others in order to obtain relief from injury to themselves." Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1379 (8th Cir.) (quoting Warth v. Seldin, 422 U.S. 490, 509, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)), cert. denied, 522 U.S. 1029, 1036 (1997). But "in Commerce Clause jurisprudence, cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate." Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 183 (1st Cir. 1999). For example, in General Motors Corp. v. Tracy, 519 U.S. 278, 136 L. Ed. 2d 761, 117 S. Ct. 811 (1997), an Ohio statute charged out-of-state natural gas vendors at a higher sales tax rate than certain in-state vendors. Although General Motors was not an out-of-state natural gas vendor, it had standing to challenge the statute's constitutionality because it was financially injured; its Ohio manufacturing facility purchased virtually all of its natural gas from out-of-state suppliers, which had passed on the cost of the higher Ohio tax rate to its customers. Id. at 286. HFI, SFI, Tesch, and Aeschlimann are similarly situated: they do substantial business with out-of-state corporations affected by the challenged law. Their imminent loss of that business as a result of Amendment E's enforcement satisfies the

injury-in-fact requirement of standing. See Clinton v. City of New York, 524 U.S. 417, 431, 141 L. Ed. 2d 393, 118 S. Ct. 2091 (1998) (concluding party had shown sufficient injury because defendant's action had a negative effect on party's "borrowing power, financial strength, and fiscal planning"); Lujan, 504 U.S. at 560 (stating that injury may be actual or imminent to satisfy standing); Ben Oehrleins, 115 F.3d at 1379 (finding sufficient injury-in-fact in suit against county where county ordinance prohibited plaintiffs from gaining access to market); Lepelletier v. FDIC, 334 U.S. App. D.C. 37, 164 F.3d 37, 42 (D.C. Cir. 1999) (noting court had previously held that denial of business opportunity can satisfy injury requirement). n5

Because we conclude that HFI, SFI, Tesch, and Aeschlimann have standing, we need not verify the independent standing of the other Plaintiffs, for they all raise similar arguments for affirmance. See Clinton, 524 U.S. at 432 n.19; Houlton, 175 F.3d at 183.

V.

The District Court held that Amendment E violates the dormant Commerce Clause. We review this conclusion of law de novo. See R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731, 734 (8th Cir. 2002).

A.

The Plaintiffs contend that Amendment E violates the so-called dormant Commerce Clause of the United States Constitution. The Commerce Clause, of course, grants Congress the authority to regulate interstate

commerce. U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce. Quill Corp. v. North Dakota, 504 U.S. 298, 312, 119 L. Ed. 2d 91, 112 S. Ct. 1904 (1992). The recognition of the dormant Commerce Clause carries out "the Framers' purpose to 'prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" Fulton Corp. v. Faulkner, 516 U.S. 325, 330-31, 133 L. Ed. 2d 796, 116 S. Ct. 848 (1996) (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 180, 131 L. Ed. 2d 261, 115 S. Ct. 1331 (1995)) (alteration in Fulton Corp.). The vision of the Framers was that "every farmer . . . shall be encouraged to produce by the certainty that he will have free access to every market in the Nation." H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539, 93 L. Ed. 865, 69 S. Ct. 657 (1949).

A state law that is challenged on dormant Commerce Clause grounds is subject to a two-tiered analysis. First, the court considers whether the challenged law discriminates against interstate commerce. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994). Discrimination in this context refers to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Id. If Amendment E is indeed discriminatory, it is "per se invalid" unless the Defendants "can demonstrate, under rigorous scrutiny, that [they have] no other means to advance a legitimate

local interest." C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 392, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994). If the law is not discriminatory, the second analytical tier provides that the law will be struck down only if the burden it imposes on interstate commerce "is clearly excessive in relation to its putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). The Plaintiffs argue that Amendment E cannot survive scrutiny under either test; that is, they argue that Amendment E impermissibly discriminates against interstate commerce and also fails the Pike balancing test.

In the first tier of analysis, the Supreme Court has recognized three indicators of discrimination against out-of-state interests. First, discrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984). Alternatively, a law could facially discriminate against out-of-state interests. See, e.g., Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 342, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1992). Third, even if a state law responds to legitimate local concerns and is not discriminatory either in its purpose or on its face, the law could discriminate arbitrarily against interstate commerce, that is, it could have a discriminatory effect. Maine v. Taylor, 477 U.S. 131, 148 n.19, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986). The Plaintiffs assert that Amendment E satisfies all three discrimination tests, but we rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests, or the second tier analysis, the Pike balancing test.

The Plaintiffs have the burden of proving discriminatory purpose, see Hughes v. Oklahoma, 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979), and can look to several sources to meet that burden. The most obvious would be direct evidence that the drafters of Amendment E or the South Dakota populace that voted for Amendment E intended to discriminate against out-of-state businesses. See SDDS, Inc. v. South Dakota, 47 F.3d 263, 268 (8th Cir. 1995). The record contains a substantial amount of such evidence as regards the drafters, the most compelling of which is the "pro" statement on a "pro-con" statement compiled by Secretary of State Hazeltine and disseminated to South Dakota voters prior to the referendum. See Constitutional Amendment E: Attorney General Explanation. Submitted by Charlie Johnson and Dennis Wiese--co-chairmen of the organization responsible for Amendment E's promotion (Wiese was a drafter of Amendment E)--the "pro" statement informed voters that, without the passage of Amendment E, "desperately needed profits will be skimmed out of local economies and into the pockets of distant corporations." Id. Further language from the "pro" statement explains that "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations." Id. We interpret the "pro" statement to be "brimming with protectionist rhetoric." See SDDS, 47 F.3d at 268.

Notes from the Amendment E drafting meetings provide additional direct evidence of the drafters' intent to discriminate against out-of-state businesses. Nancy Thompson, who was involved in the drafting,

testified that Murphy Family Farms and Tyson Foods, two out-of-state corporations, were proposing to build hog farming facilities in South Dakota and that Amendment E's supporters wanted "to get a law in place to stop them." Trial Tr. at 244. At a meeting on March 14, 1997, discussions were held concerning the best way to combat Tyson, Murphy, and others. Draft Hog Meeting Minutes (Mar. 14, 1997). A memorandum from April 28, 1997, from John Bixler, director of DRA, to participants from an April 21 meeting stated, in reference to a discussion at the April 21 meeting, that "many have commented that just as they do not want Murphys and Tysons walking all over them, they don't want Farmland or Minnesota Corn Producers walking over them . . . either." Memorandum from John Z. Bixler at 4 (Apr. 28, 1997). These comments concern the drafters' desire to prohibit out-of-state cooperatives, in addition to corporations, from farming in South Dakota. We also note that the planning meetings that led to Amendment E were known as the "hog meetings." Trial Tr. at 370; see also Draft Hog Meeting Minutes (Mar. 14, 1997). Again, this is a specific reference to the out-of-state corporations who enter into contracts with South Dakota farmers to raise hogs. Even more blatant was the remark at trial by Wiese that Amendment E was at least motivated in part by "the Murphy hog farm unit [in North Carolina] and what its [sic] done to the environment." Trial Tr. at 659.

As for indirect evidence of discriminatory purpose, irregularities in the drafting process can hint at such a purpose. See SDDS, 47 F.3d at 269. Our concern in this case about the drafting process is the information used by the drafters. In this case, the record leaves a strong impression that the drafters and supporters of

Amendment E had no evidence that a ban on corporate farming would effectively preserve family farms or protect the environment, and there is scant evidence in the record to suggest that the drafters made an effort to find such information.

The testimony of Mary Luanne Napton, executive director of SDRC and secretary of the Amendment E drafting committee, illuminates this point. Napton, a "registered environmental professional," Trial Tr. at 348, testified that she was unfamiliar with all of South Dakota's environmental regulations at the time Amendment E was drafted. Id. at 386. She nevertheless believed that Amendment E would be necessary even if the State's current environmental regulations were enforced. Id. at 387. Her rationale was that "personal responsibility" was the best way to ensure regulatory compliance, suggesting that family-owned farms would accept responsibility where corporate-owed farms would not. Id. We recognize the argument that an individual farmer could have greater incentive than a limited liability entity to avoid wrongdoing, but we believe that if the drafters were seriously concerned with long-term environmental hazards, as Napton claimed she was, they would have made it a point to learn of the effects of current regulations. It is especially disconcerting that Napton--who has also spent ten years lobbying the legislature for new environmental regulations--could not explain the present and future effects of the current environmental laws. If she lacked this information, we can presume that the entire committee did, too. n6

The record contains even less evidence that the drafters considered how Amendment E would affect

the economic viability of family farmers. The drafters relied on studies that correlated industrialized farming with higher levels of poverty. There is no evidence in the record, however, that they utilized or commissioned any economic forecasts as to the effect of wholly shutting out corporate entities from farming in South Dakota. Even when an expert contacted by a member of the drafting committee inquired whether it was a good idea to create such "complete" barriers to capital flow into the state, Comments on YSD Proposed Constitutional Amendment P 7, the committee charged forward without hesitation, see Trial Tr. at 420. Our point here is not to adopt one economic theory or another, but rather to emphasize that no study or forecast was commissioned to evaluate any theories. We believe that this lack of information serves as indirect evidence of the drafters' intent to create a law specifically targeting out-of-state businesses, which the drafters viewed as the sole cause of the perils facing family farmers and a leading potential cause of environmental damage. Another source of evidence from the drafting process supports this inference: a member of the drafting committee admitted that the committee completed the drafting process quickly because its members wanted to prevent Tyson Foods and Murphy Family Farms from building facilities in South Dakota. Trial Tr. at 244-45.

Whether Amendment E would protect family farmers and the environment is unknown. It would be reasonable to surmise that the less information concerning the potential impact of Amendment E that the drafters had, the less likely that Amendment E would actually be an effective remedy for the problems it was purportedly designed to address. A low

probability of effectiveness can be indirect evidence of discriminatory purpose. SDDS, 47 F.3d at 268-69; see also Pete's Brewing Co. v. Whitehead, 19 F. Supp. 2d 1004, 1016 (W.D. Mo. 1998) (resting discriminatory intent conclusion partially on determination that statute at issue did little to advance its purported purpose). But more importantly, we believe, the evidence in the record demonstrates that the drafters made little effort to measure the probable effects of Amendment E and of less drastic alternatives. We are thus left, like the South Dakota populace that voted on Amendment E, without any evidence as to the law's potential effectiveness. That the drafting committee and the voters were without such evidence supports the conclusion compelled by the direct evidence: the intent behind Amendment E was to restrict in-state farming by out-of-state corporations and syndicates in order to protect perceived local interests. Such an intent bespeaks of "the economic protectionism that the Commerce Clause prohibits." See W. Lynn Creamery v. Healy, 512 U.S. 186, 205, 129 L. Ed. 2d 157, 114 S. Ct. 2205 (1994).

In concluding that Amendment E was motivated by a discriminatory purpose, we are cognizant of the argument that discerning the purpose of a constitutional provision is an impossible exercise. In the view of the District Court, "It would be impossible . . . to ascertain the intentions of the thousands of citizens of South Dakota who voted for Amendment E. We do not have here a factual scenario of elected delegates to a constitutional convention where a record is kept of all proceedings." S.D. Farm Bureau, 202 F. Supp. 2d at 1028. We do, however, have evidence of the intent of individuals who drafted the amendment that went

before the voters. It is clear that those individuals had a discriminatory purpose. See SDDS, 47 F.3d at 267. Discriminatory purpose is at the heart of dormant Commerce Clause analysis and is often incorporated into both first-tier analysis and second-tier Pike balancing analysis. See, e.g., Fulton Corp., 516 U.S. at 330 (explaining dormant Commerce Clause as a prohibition on state regulations designed with the purpose of benefitting in-state interests by burdening out-of-state interests); W. Lynn Creamery, 512 U.S. at 196 (noting purpose of state's unconstitutional pricing scheme although resting decision on statute's discriminatory effect); Taylor, 477 U.S. at 148 (equating purposeful economic protectionism with per se invalidity). n7 Although the Supreme Court has not laid out a specific test for determining discriminatory purpose, n8 we are guided by precedent in selecting the types of evidence on which we have relied to reach our conclusion. See Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 336 (4th Cir. 2001) (analyzing "historical background of and specific sequence of events leading up to" challenged state action to find discriminatory purpose), cert. denied, 535 U.S. 904, 151 L. Ed. 2d 142, 152 L. Ed. 2d 142, 122 S. Ct. 1203 (2002); SDDS, 47 F.3d at 268 (relying in part on referendum pamphlet to find discriminatory purpose); cf. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 743-46, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989) (analyzing statements by drafters of statute in determining proper reading--i.e., purpose--of copyright statute). The evidence in this case leads to a single conclusion: Amendment E was motivated by a discriminatory purpose.

B.

Because we conclude that Amendment E was motivated by a discriminatory purpose, we must strike it down as unconstitutional unless the Defendants can demonstrate that they have no other method by which to advance their legitimate local interests. See C & A Carbone, 511 U.S. at 392. The Supreme Court has referred to this test as one of the "strictest scrutiny." Or. Waste Sys., 511 U.S. at 101. The Defendants emphasize the legitimacy of their interests, which we can generally state to be the promotion of family farms and the protection of the environment. We have previously concluded that promoting family farms is a legitimate state interest, see MSM Farms, Inc. v. Spire, 927 F.2d 330, 333 (8th Cir.) (finding purpose legitimate in Equal Protection Clause analysis), cert. denied, 502 U.S. 814, 116 L. Ed. 2d 40, 112 S. Ct. 65 (1991), and the purpose of environmental protection is equally legitimate. The focus of this test of the "strictest scrutiny," however, does not concern the strength of the interests advanced by the challenged law. Rather, the question is whether reasonable non- discriminatory alternatives exist to advance the interests. The Defendants bear the burden of demonstrating there is no such alternative. Or. Waste Sys., 511 U.S. at 100-01.

We cannot say with certainty that any alternative will ultimately succeed in meeting the goals of Amendment E because we are "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them." See Tracy, 519 U.S. at 308. Our inability to make these determinations explains why the Defendants, who should have the capability to provide economic and environmental

forecasts, have the burden of proving that no non-discriminatory alternative exists. Although the record contains evidence linking industrial farming with poverty and environmental problems, it contains no evidence that suggests, evaluates, or critiques alternative solutions.

While we are loath to propose alternatives, we believe several could be found in a 1998 report introduced by the Defendants called "A Time to Act," a report commissioned by the federal government and addressed to the United States Department of Agriculture that lays out the case for regulations that favor family farms. See A Time to Act: A Report of the USDA National Comm'n on Small Farms (1998). Although the recommendations in the Report relate to federal policy and legislation, in many cases those recommendations are applicable to the states, as well. For example, the State could implement an initiative to optimize the labor and resources of small farm operators. See id. at 10. Second, the State could create an oversight process to regulate contracts between corporations and syndicates and South Dakota farmers. See id. at 62-63. In addition, to the extent environmental waste from hog farms is a concern, the State could introduce stricter environmental regulations or could more aggressively enforce its current environmental laws. See Trial Tr. at 659-60. Finally, in an effort to decrease the concentration of livestock in feed lots and the like, the State could set limits on the number of livestock that could be fed in a particular area by a farmer regardless of how the farmer organizes his or her business.

Regardless of the potential effects of any of these

alternatives, the Defendants have failed to meet the high burden of demonstrating their ineffectiveness. Because Amendment E has a discriminatory purpose, and because the Defendants have not satisfied their burden of showing that non-discriminatory alternatives would not advance Amendment E's interests, we must conclude that Amendment E violates the dormant Commerce Clause. n9

VI.

Amendment E violates the dormant Commerce Clause. Accordingly, we affirm the order of the District Court enjoining its enforcement.

FOOTNOTES

n1 In full, the exemption applies to:agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock. S.D. Const. art. XVII, § 22, cl. 2.

n2 The State Officials and the Intervenors filed separate briefs and had separate counsel at trial and on appeal.

n3 Grey was not the first case in which we permitted a

plaintiff to seek injunctive relief for an ADA violation from a state official in his or her official capacity. See Gibson v. Ark. Dep't of Corr., 265 F.3d 718, 722 (8th Cir. 2001).

n4 The District Court also justified its reconsideration of the ADA claim on the ground that SDFB had associational standing to bring the ADA claim. S.D. Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, 202 F. Supp. 2d 1020, 1039 (D.S.D. 2002). The issue of SDFB's standing, however, is irrelevant to Rule 15(b) analysis. The question is not whether one of the Plaintiffs was constitutionally and prudentially entitled to raise the ADA claim at trial, but rather whether the claim was in fact raised and actually tried.

n5 We note that the Defendants also argued that Tesch cannot show an injury because they do not read Amendment E to bar Harvest States from engaging in farming in South Dakota. Were we to apply the canon of expresio unius est exclusio alterius, we could interpret § 21 not to apply to cooperatives because § 21 does not list cooperatives. Section 22(2), however, exempts certain types of cooperatives from the restrictions of § 21. This exemption would be meaningless unless cooperatives were subject to § 21. Therefore, in order to avoid construing § 22(2) as being mere surplusage, we interpret § 21 to restrict cooperatives in the same way that it does corporations and syndicates. See United States v. Gomez-Hernandez, 300 F.3d 974, 979 (8th Cir. 2002), cert. denied, 123 S. Ct. 931 (2003).

n6 The Defendants do not, of course, bear the burden of disproving a discriminatory purpose, but they almost

certainly would have introduced any evidence used by the drafting committee that compared the potential impact that Amendment E would have on the environment with enhanced enforcement of current environmental regulations; such evidence is highly relevant to the "per se" invalidity test of the first tier of dormant Commerce Clause analysis as well as to measuring Amendment E's benefit for the purposes of the Pike balancing test of the second tier.

n7 See also Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L Rev. 1091, 1206-1233 (1986) (presenting and defending thesis that Supreme Court's dormant Commerce Clause analysis is driven by desire to prevent purposeful protectionism).

n8 See, e.g., Julian Cyril Zebot, Note, Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce, 86 Minn. L. Rev. 1063, 1077-84 (2002) (cataloging and critiquing non-uniform discriminatory purpose analyses by federal courts of appeal).

n9 As we decide this case based upon the first tier of dormant Commerce Clause analysis, we need not discuss the Pike balancing test.

CIV. 99-3018

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION

SOUTH DAKOTA FARM BUREAU, INC., SOUTH DAKOTA SHEEP GROWERS ASSOCIATION, INC., HAVERHALS FEEDLOT, INC., SJOVALL FEEDYARD, INC., FRANK D. BROST, DONALD TESCH, WILLIAM A. AESCHLIMANN, SPEAR H RANCH, INC., MARSTON HOLBEN, MARSTON AND MARION HOLBEN FAMILY TRUST, MONTANA-DAKOTA UTILITIES CO., NORTHWESTERN PUBLIC SERVICE, and OTTER TAIL POWER COMPANY,
Plaintiffs,

-vs-

JOYCE HAZELTINE, in her official capacity as Secretary of State of South Dakota and MARK W. BARNETT, in his official capacity as Attorney General of South Dakota, Defendants. DAKOTA RURAL ACTION and SOUTH DAKOTA RESOURCES COALITION,
Defendant-Intervenors.

May 16, 2002, Decided
May 17, 2002, Filed

COUNSEL: For SOUTH DAKOTA FARM BUREAU, INC., SOUTH DAKOTA SHEEP GROWERS ASSOCIATION, INC., HAVERHALS FEEDLOT, INC., SJOVALL FEEDYARD, INC., FRANK D.

BROST, DONALD TESCH, WILLIAM A. AESCHLIMANN, SPEAR H RANCH, INC., MARSTON HOLBEN, HOLBEN FAMILY TRUST, MARSTON AND MARIAN, MONTANA-DAKOTA UTILITIES COMPANY, NORTHWESTERN PUBLIC SERVICE, OTTER TAIL POWER COMPANY, plaintiffs: Richard O. Gregerson, Woods, Fuller, Shultz & Smith, PC, Sioux Falls, SD.

For SOUTH DAKOTA FARM BUREAU, INC., SOUTH DAKOTA SHEEP GROWERS ASSOCIATION, INC., HAVERHALS FEEDLOT, INC., SJOVALL FEEDYARD, INC., FRANK D. BROST, DONALD TESCH, WILLIAM A. AESCHLIMANN, plaintiffs: Susan M. Sabers, Woods, Fuller, Shultz & Smith, PC, Sioux Falls, SD.

For SOUTH DAKOTA FARM BUREAU, INC., SOUTH DAKOTA SHEEP GROWERS ASSOCIATION, INC., HAVERHALS FEEDLOT, INC., SJOVALL FEEDYARD, INC., FRANK D. BROST, DONALD TESCH, WILLIAM A. AESCHLIMANN, SPEAR H RANCH, INC., MARSTON HOLBEN, HOLBEN FAMILY TRUST, MARSTON AND MARIAN, MONTANA-DAKOTA UTILITIES COMPANY, NORTHWESTERN PUBLIC SERVICE, OTTER TAIL POWER COMPANY, plaintiffs: Thomas P. Tonner, Tonner, Tobin & King, Aberdeen, SD.

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For MARK W. BARNETT, JOYCE HAZELTINE, defendants: Mark W. Barnett, Roxanne Giedd, Lawrence E. Long, Diane M. Best, Attorney General's Office, Pierre, SD.

EVERETT HOLSTEIN, RUDY MEDUNA, DAN HODGES, amicus: Patrick J. Anderson, Sioux Falls, SD.

EVERETT HOLSTEIN, RUDY MEDUNA, DAN HODGES, amicus: Robert V. Broom, Broom, Johnson & Clarkson, Omaha, NE.

For DAKOTA RURAL ACTION, SOUTH DAKOTA RESOURCES COALITION, intervenor defendants: John H. Davidson, Jr., USD School of Law, Vermillion, SD.

For DAKOTA RURAL ACTION, SOUTH DAKOTA RESOURCES COALITION, intervenor defendants: James Jay Tutchton, University of Denver, Randy C.

Canney, Denver, CO.

JUDGES: CHARLES B. KORNMANN, United States District Judge.

OPINIONBY: CHARLES B. KORNMANN

ΘPINION:

MEMORANDUM OPINION

KORNMANN, UNITED STATES DISTRICT JUDGE

INTRODUCTION

Plaintiffs seek declaratory and injunctive relief, challenging the constitutionality of the 1998 initiated amendments to Article XVII of the South Dakota Constitution, specifically Sections 21 through 24 (known as and hereinafter referred to as "Amendment E" because of its placement on the general election ballot when enacted by the voters of South Dakota). Amendment E in general prohibits limited liability business enterprises from acquiring real estate used for farming and from engaging in farming in South Dakota. Farming includes for the purposes of this action ranching as well. The specific claims are that the amendments are in violation of the United States Constitution, namely the Commerce Clause (more particularly the dormant Commerce Clause), the Equal Protection Clause, the Contracts Clause, the Supremacy Clause, and the Americans With Disabilities Act ("ADA"). This Court has jurisdiction over the subject matter and over the parties. See 28

U.S.C. § 1331.

Being called upon to decide whether certain provisions of the South Dakota Constitution violate the United States Constitution is a heavy burden and one the court does not relish or take lightly. Certain general principles of law must be applied in the necessary analysis. There is a strong presumption of constitutionality as to these provisions. Unless unconstitutional on its face, there must be a clear showing of arbitrariness and irrationality or clear conflict with the United States Constitution. Plaintiffs bear a heavy burden. There are legitimate state interests or purposes in seeking to prevent further concentrations of agricultural land and the production of food and animals from such land, seeking to prevent in the future agricultural land and production of animals and crops from passing into the hands of limited liability entities to the detriment of traditional family farm units and family farm limited liability entities primarily engaged in farming or ranching, and seeking to protect family life and values. South Dakota may make reasonable distinctions between business entities. Limited liability entities exist, if at all, by virtue of state laws permitting the use of such entities. States may decide legitimately to permit no limited liability entities. If Amendment E is susceptible of a reasonable interpretation which supports the constitutionality, the court must accord the measure that meaning. The court is not to adopt a strained, impractical, or absurd result, if possible. Federal judges are not, of course, "super legislatures." Some of these general principles will be discussed later with appropriate references to legal authority.

§ 21 of Article XVII of the South Dakota Constitution provides:

No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming. The term, corporation, means any corporation organized under the laws of any state of the United States or any country. The term, syndicate, includes any limited partnership, limited liability partnership, business trust, or limited liability company organized under the laws of any state of the United States or any country. A syndicate does not include general partnerships, except general partnerships in which nonfamily (sic) farm syndicates or nonfamily (sic) farm corporations are partners. The term, farming, means the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products.

§ 22 of Article XVII of the South Dakota Constitution provides:

The restrictions in § 21 of Article XVII do not apply to:

(1) A family farm corporation or syndicate. A family farm corporation or syndicate is a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another

within the fourth degree of kinship according to civil law, or their spouses. At least one of the family members in a family farm corporation or syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration. None of the corporation's or syndicate's partners, members, or stockholders may be nonresident aliens, or other corporations or syndicates, unless all of the stockholders, members, or partners of such entities are persons related within the fourth degree of kinship to the majority of partners, members, or stockholders in the family farm corporation or syndicate; (emphasis supplied)

(2) Agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock; So a corporation may own real estate which is used for the keeping and feeding of livestock if the livestock so fed and kept on that real estate is owned by a qualified cooperative.

(3) Nonprofit corporations organized under state nonprofit corporation law;

(4) Agricultural land, which, as of the approval date of this amendment, is being farmed, or which is owned or leased, or in which there is a legal or beneficial interest, directly or indirectly owned, acquired, or obtained by a corporation or syndicate, if such land or other interest is held in continuous ownership or under continuous lease by the same such corporation or syndicate. For the purposes of this exemption, land purchased on a contract signed as of the approval date of this amendment is considered as owned on that date;

(5) Livestock, which as of the approval date of this amendment, is owned by a corporation or syndicate. For the purposes of this exemption, livestock to be produced under contract for a corporation or syndicate are considered as owned, if the contract is for the keeping or feeding of livestock and is signed as of the approval date of this amendment, and if the contract remains in effect and is not terminated by either party to the contract. This exemption does not extend beyond the term of any contract signed as of the approval date of this amendment;

(6) A farm operated for research or experimental purposes, if any commercial sales from the farm are only incidental to the research or experimental objectives of the corporation or syndicate;

(7) Land leases by alfalfa processors for the production of alfalfa;

(8) Agricultural land operated for the purpose of growing seed, nursery plants, or sod;

(9) Mineral rights on agricultural land;

(10) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential nonfarming (sic) purposes, for a period of five years from the date of purchase. A corporation or syndicate may hold such agricultural land in such acreage as may be necessary to its nonfarm (sic) business operation, but pending the development of the agricultural land for nonfarm (sic) purposes, such land may not be used for farming except under lease to a family farm corporation or family farm syndicate or a non syndicate or noncorporate (sic) farm;

(11) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and may not be used for farming before being disposed of, except under a lease to a family farm corporation or syndicate, or a nonsyndicate (sic) or noncorporate (sic) farm. Any livestock so acquired shall be disposed of within six months;

(12) Agricultural lands held by a state or nationally chartered bank as trustee for a person, corporation or syndicate that is otherwise exempt from the provisions of § § 21 to 24, inclusive, of Article XVII;

(13) A bona fide encumbrance taken for purposes of security;

(14) Custom spraying, fertilizing, or harvesting;

(15) Livestock futures contracts, livestock purchased

for slaughter within two weeks of the purchase date, or livestock purchased and resold within two weeks.

§ 23 of Article XVII of the South Dakota Constitution provides:

If a family farm corporation or family farm syndicate that has qualified under all the requirements of a family farm corporation or a family farm syndicate ceases to meet the defined criteria, it has twenty years, if the ownership of the majority of the stock of such corporation, or the majority of the ownership interest of such syndicate, continues to be held by persons related to one another within the fourth degree of kinship or their spouses, and their land holdings are not increased, to either requalify (sic) as a family farm corporation or family farm syndicate or dissolve and return to personal ownership.

§ 24 of Article XVII of the South Dakota Constitution provides:

Any corporation or syndicate that owns agricultural land or engages in farming is required to report information necessary for the enforcement of § § 21 to 24, inclusive, of Article XVII to the secretary of state on an annual basis, under rules promulgated by the secretary pursuant to state law. The secretary of state shall monitor such reports and notify the attorney general of any possible violations, and any resident of the state may also notify the attorney general of any possible violations. If a corporation or syndicate violates any provision of § § 21 to 24, inclusive, of Article XVII, the attorney general shall commence an action in circuit court to enjoin any pending illegal

purchase of land or livestock, or to force divestiture of land or livestock held in violation of § § 21 to 24, inclusive, of Article XVII. The court shall order any land held in violation of § § 21 to 24, inclusive, of Article XVII to be divested within two years and any livestock to be divested within six months. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the state. If the attorney general fails to bring an action in circuit court to enforce § § 21 to 24, inclusive, of Article XVII, any resident of the state has standing in circuit court to sue for enforcement.

Having set forth the language of Amendment E, the court will now describe what the measure provides, what it does not provide, and what rules of law must be applied. The language used, almost without exception, is not ambiguous and therefore must be read and applied to the extent it is clearly written. This is not to say, as will hereinafter appear, that all portions of Amendment E are internally consistent. They are not. In fact, some provisions are hopelessly internally inconsistent and this complicates any reading and understanding of Amendment E.

"It is a basic rule of statutory interpretation . . . that a statute which is clear and unambiguous on its face is not subject to construction." Northwest Paper Co. v. Federal Power Commission, 344 F.2d 47, 50 (8th Cir. 1965), (citing Blair v. City of Chicago, 201 U.S. 400, 26 S. Ct. 427, 50 L. Ed. 801 (1906); Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271, 273, 274 (8 Cir. 1962), and 2 Sutherland, Statutory Construction, 334 § 4702 (3rd Ed. 1943)). "When the language of a statute is clear, certain, and unambiguous, there is no

occasion for construction, and the court's only function is to declare the meaning of the statute as clearly expressed in the statute." American Meat Institute v. Barnett, 64 F. Supp.2d 906, 915 (D.S.D. 1999), (quoting South Dakota Subsequent Injury Fund v. Casualty Reciprocal Exchange, 1999 SD 2, P 17, 589 NW2d 206, 209 (1999), (quoting Delano v. Petteys, 94 SDO 700, 520 NW2d 606 at 608), (quoting in turn Petition of Famous Brands Inc., 347 NW2d 882 at 884-85))).

The South Dakota Supreme Court has "repeatedly stated that when the terms of a statute are clear, certain and unambiguous in their meaning, it is the function of the court to give them effect and not to amend the statute to avoid or produce a particular result." S.D.E.A. v. Barnett, 1998 SD 84, P 57, 582 N.W.2d 386, 399 (Zinter, Judge, concurring in part, dissenting in part) (quoting Matter of Sales Tax Refund Applications, 298 N.W.2d 799, 802 (S.D.1980)). "'Unless exceptional circumstances dictate otherwise,' judicial inquiry into the meaning of a statute is complete once the Court finds that the terms of the statute are unambiguous." S.D.E.A. v. Barnett, 1998 SD 84, P 57, 582 N.W.2d 386, 399 (Zinter, Judge, concurring in part, dissenting in part) (quoting Burlington No. R. Co. v. Okla. Tax Comm'n, 481 U.S. 454, 461, 107 S. Ct. 1855, 1860, 95 L. Ed. 2d 404, 412 (1987)).

American Meat Institute v. Barnett, 64 F. Supp.2d at 915. Canons of statutory construction, when properly applied, are useful tools but are only aids to judicial interpretation which should not be applied when there is no ambiguity. United States v. Vig, 167 F.3d 443, 448 (8th Cir. 1999).

Unless exceptional circumstances dictate otherwise, when the terms of a statute are unambiguous, judicial inquiry is complete. See In re Erickson Partnership, 856 F.2d 1068, 1070 (8th Cir.1988). "We ask not what the Congress means; we ask only what the statute means." United States v. Hepp, 656 F.2d 350, 353 (8th Cir.1981); see, e.g., Northern States Power Co. v. United States, 73 F.3d 764, 766 (8th Cir.1996) (stating that when "statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative").

United States v. Vig, 167 F.3d at 448.

In the present case, provisions that would normally be statutory have been written into the South Dakota Constitution. The rules set forth above and other rules of statutory construction apply to readings of language in a state constitution as well. See, e.g. State v. Neville, 346 NW2d 425, 428 (SD 1984), In re Janklow, 530 NW2d 367, 370 (SD 1995) (citing Levasseur v. Wheeldon, 79 S.D. 442, 112 NW2d 894 (SD 1962)), and Cid v. State Dept. of Social Services, 1999 SD 108, 598 NW2d 887 (SD 1999).

Since it is clear that Amendment E is patterned to some extent from what was done in the Nebraska Constitution, the Nebraska provisions (upheld by the Nebraska Supreme Court and by the United States Court of Appeals for the Eighth Circuit but on much more narrow grounds than are presented here) will be compared with the South Dakota provisions as the court proceeds with the analysis.

It is an established rule of statutory construction that the adoption of a statute previously in force in some other jurisdiction is presumed to be the adoption of the interpretation thereof which had been theretofore placed upon it by the judicial tribunal whose duty it was to construe it. Black, Interpretation of Laws, p. 159, Sec. 70; McDonald v. Hovey, 110 U.S. 619, 628, 4 Sup.Ct. 142, 28 L. Ed. 269; Sanger v. Flow, 1 C.C.A. 56, 58, 48 Fed. 152, 154; Blaylock v. Incorporated Town of Muskogee, 54 C.C.A. 639, 117 Fed. 125.

Harrill v. Davis, 168 F. 187, 198 (8th Cir. 1909). This rule applies, of course, only to the extent that the South Dakota language tracks what was done in Nebraska and only to the extent that the language was interpreted as a matter of statutory construction.

Section 21 of Article XVII is very broad. It prohibits any corporation or syndicate from (1) acquiring or otherwise obtaining an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in South Dakota, or (2) engaging in farming. These prohibitions are as broad as possible as to corporations and syndicates.

The court will analyze the first prohibition. Thus, "no corporation or syndicate" may, as to real estate "used for farming" in South Dakota (unless exempted by Section 22 of Article XVII) own it, lease it, acquire an easement, acquire an option, acquire a mineral interest, acquire a security interest or mortgage, acquire a statutory lien, acquire a contract for deed interest, become a beneficiary under a trust, or record a declaration of taking for purposes of eminent domain (SDCL 21-35 and SDCL 31-19).

A corporation is defined in Amendment E as "any corporation" organized under the laws of any state or any country. This clearly covers not only business corporations but, unless otherwise specifically exempted, municipal corporations, nonprofit corporations, foreign business corporations, business development corporations (SDCL Chapter 47-10), local industrial development corporations (SDCL 5-14-22 and 5-14-23), community development corporations (SDCL 51A-4-20 and 51A-4-20.1), medical corporations, medical service corporations, chiropractic corporations, optometric corporations, podiatric corporations, physician's assistants corporations, nursing corporations, dental corporations, veterinary corporations, health care corporations, professional corporations for the practice of law, professional corporations for the practice of public accounting, professional corporations for the practice of engineering, architecture, or surveying, and cemetery corporations.

We know that South Dakota, even when the legislature acts, has no legislative history to help guide courts. The intent of one or more members of the legislature is without legal significance in South Dakota. This includes the legislator or legislators who drafted or sponsored the legislation. Likewise, the intentions of the drafters of Amendment E or those who promoted it are without legal significance. It would be impossible, of course, to ascertain the intentions of the thousands of citizens of South Dakota who voted for Amendment E. We do not have here a factual scenario of elected delegates to a constitutional convention where a record is kept of all proceedings.

"Syndicate" is defined in Amendment E as including any limited partnership, limited liability partnership, business trust (and the court notes that a business trust was defined by SDCL 47-14-1 at the time Amendment E was adopted, which definition has been revised and significantly broadened effective July 1, 2001, by SDCL 47-14A-1 (1)), and limited liability company organized under the laws of any state or country. "Syndicate" also includes a general partnership if any partner is a non-family farm syndicate or non-family farm corporation.

Section 8(1) of the Nebraska Constitution is very similar to Section 21 of Article XVII of the South Dakota Constitution. There are some differences. The Nebraska language speaks of the prohibition covering the acquisition of or otherwise obtaining an interest "in any title" to real estate used for farming or ranching. South Dakota makes no reference to "any title" and no reference to "ranching." These differences, however, are legally immaterial.

Nebraska, while also defining a syndicate, exempts from the definition of a syndicate a limited partnership in which the partners "are members of a family". This is a rather broad exemption. South Dakota has no such exemption. All limited partnerships are banned, so to speak, in South Dakota unless exempted in Section 22 wherein there is an exemption but only if a limited partnership is first formed and a majority of the interests therein are held by members of a family (as defined as well in Section 22 (1) of Article XVII) or a trust created for the benefit of a member of a family. In other words, a trust itself (standing alone, if you will, for the purpose of farming or owning agricultural land) is not exempt in South Dakota (unless exempted in

Section 22) but may under certain circumstances be a member of a qualifying family farm corporation or a qualifying family farm syndicate.

In Section 8 (1) (the "companion" to South Dakota's Section 21), Nebraska exempts a "trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred . . . or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch, and none of whom are nonresident aliens. This shall not include general partnerships." Thus, Nebraska permits general partnerships to own or otherwise acquire an interest in agricultural land and to engage in farming, the reason being that Nebraska does not include a general partnership in the definition of "syndicate." South Dakota also does not include some general partnerships in the definition of "syndicate" but only if no partner in the general partnership is a non-family farm syndicate or non-family farm corporation. South Dakota in Section 21 speaks of a "business trust" whereas Nebraska in Section 8(1) speaks of a "trust."

Turning to the second prohibition in Article 21, namely "engage in farming", "farming" means the cultivation of land for the production of crops, fruit or other horticultural products. It also includes the ownership, keeping or feeding of animals for the production of livestock or livestock products. Again, this language is all very broad. The Nebraska language is equally broad. A question may arise whether a non-qualifying entity may own land enrolled in the federal conservation reserve program, subject perhaps to the ultimate requirement of divestiture if farming activities later

commence on the real estate. We must remember that the Amendment E prohibition is as to "any real estate used for farming." We must also remember that Amendment E defines "farming" as the "cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products." This question, however, will not be answered in this opinion since there is no need to do so.

Both states then specify certain exemptions. The South Dakota exemptions are found in Section 22. "Exemptions are based upon considerations of public policy. Constitutional and statutory provisions are to be given a reasonable, natural and practical construction to effectuate the purpose for which an exemption is created." C.A. Wagner Const. Co. v. City of Sioux Falls, 71 S.D. 587, 27 NW2d 916, 920 (SD 1947) (quoting from State ex rel. Eveland v. Erickson, 44 S.D. 63, 182 NW 315). This same language was later quoted in McFarland v. Keenan, 77 S.D. 39, 84 NW2d 884 (SD 1957).

The first exemption (Section 22 (1)) is a "family farm corporation or syndicate." This describes an entity engaged in farming "or the ownership of agricultural land" in which a majority of the partnership interests, shares of stock or other ownership interests are held by "members of a family or a trust (and this would seem at this point of reading Section 22 to mean "any trust") created for the benefit of a member of that family." The language does not state "members of the same family." It states "members of a family" and all persons are obviously members of "a family." A reasonable reading of the language, however, is that "family" is used in the

singular and members of different families would not qualify in deciding whether members of "a family" own a majority interest. The language "trust created for the benefit of a member of that family" (emphasis supplied) also indicates that the correct interpretation is that members must be members of the same family under Amendment E.

Family farm corporations and syndicates are not exempted as to acquiring any interests other than "ownership" unless that entity is also engaged in farming. Family farm corporations, family farm limited partnerships, and family farm limited liability companies, just like all other corporations, are covered by Section 21 and none are exempted in Section 22 (1) as to acquiring easements or as to acquiring any interest (other than outright ownership), whether legal, beneficial, or otherwise in any agricultural real estate unless that entity is also engaged in farming. A "family" is defined as consisting of people related to one another within the fourth degree of kinship according to civil law "or" their spouses. At least one of those family members doing business in a family farm corporation or syndicate must reside on the farm or "be actively engaged in the day-to-day labor and management of the farm." As to both day-to-day labor and management functions, the family member must perform "both daily or routine (and there is obviously some ambiguity here since activity may well be routine without being on a daily basis) substantial physical exertion and administration." As to such corporation or syndicate, no stockholder or member may be a non-resident alien. The term "non-resident alien" is not defined in Amendment E and may mean an alien who is a non-resident of South Dakota although a resident of some

other state. It may also mean an alien who is a non-resident of the United States. By statute, an alien who is not a resident of South Dakota or some other state or territory of the United States may not own agricultural land of more than 160 acres, except such land as was received by devise or inheritance. See SDCL 43-2A-2. Any such alien who may acquire such lands by devise or descent has three years from acquiring title to dispose of the land. See SDCL 43-2A-3. Taking into account Section 14, Article VI. of the South Dakota Constitution ("No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property") as well as decisions of the United States Supreme Court, the term "nonresident alien" as contained in Amendment E means an alien who is a non-resident of the United States.

No member or stockholder (of the family farm corporation or syndicate) may be another corporation or syndicate unless all the persons who own interests in that other corporation or other syndicate are all persons related within the fourth degree of kinship (there being no reference in this sentence to spouses) to the majority of the persons who own interests in the family farm corporation or syndicate itself.

The Nebraska first exemption is quite similar although it speaks of a family farm or ranch corporation; there is no reference to a ranch in the South Dakota provision. This is, however, legally immaterial since, as stated above, a ranch is covered by the definition of the term "farming" which relates back to the definition of real estate used for farming. The Nebraska first exemption deals only with family farm or ranch corporations and

does not address syndicates. Nebraska provides that no corporation or partnership may be a stockholder in the farm or ranch corporation unless all the stockholders or partners of such entities are "persons related within the fourth degree of kindred to the majority of stockholders in the family farm corporation." The Nebraska language is all one sentence. South Dakota has broken the language down to, in effect, five sentences in Section 22 (1).

No mention is made in Section 21 of any cooperative being subject to the prohibitions. That is true in the Nebraska provision as well. A cooperative is not a corporation. No one, at least in South Dakota, calls a cooperative a corporation. No one calls a cooperative a syndicate. Even a comparison of Section 21 (where the reference is to a corporation) with Section 22 (2) makes it clear that if a cooperative was indeed a corporation intended to be exempted by Section 22 (2), the word "corporation" would have been used in the exemption. It is not. The word "corporation" is never mentioned in the exemption.

The South Dakota legislature has never presumed that a cooperative is the same thing as a corporation. See, e.g., SDCL 10-47B-3 (32) in which the definition of a "person" is said to include, inter alia, "a corporation" and "a cooperative." Cooperatives in South Dakota are governed by SDCL Chapters 47-15 through 47-18 and by SDCL Chapter 47-20. Foreign cooperatives are governed by SDCL Chapter 47-19 and 47-20. Rural electric cooperatives are governed by SDCL 47-21. A cooperative receives very different treatment under federal laws than does a corporation. Cooperatives are, in general, pursuant to 26 U.S.C. § 501, exempt from

federal income taxes, unlike the corporations sought to be reached by Amendment E. The corporations sought to be reached by Amendment E are, of course, not Subchapter "S" corporations. The very idea of a cooperative is an organization of members (not stockholders) entitled in some cases to distributions of earnings based upon patronage. In a corporation, a stockholder is not rewarded based upon the amount of business the stockholder does with the corporation. In fact, a corporation doing any substantial amount of business has no idea what business a stockholder may have conducted with the corporation. Obviously, the very broad prohibitions in Section 21 are not to be lightly or casually extended to cooperatives or to any other unmentioned entity. Nor is this court allowed to add entities or language to Section 21.

Amendment E sprang from South Dakota's experiences with the statutory corporate farming restrictions found in SDCL Chapter 47-9A. SDCL 47-9A-2 (2) defines "corporation" or "any derivation of 'corporation'" as including "both corporations under the South Dakota Business Corporation Act and limited liability companies under the South Dakota Limited Liability Company Act." Governor William Janklow asked Attorney General Barnett for an official opinion as to whether the prohibitions in the corporate farming act apply to cooperatives. In Opinion No. 95-02 (not cited by any party in this case to the court), the Attorney General expressed his opinion to Governor Janklow that, even though a cooperative is defined at SDCL 47-15-1 (2) as a "cooperative corporation", a cooperative is exempt from the Family Farm Act. This court agrees with that opinion of the South Dakota Attorney General.

There are further clear reasons under South Dakota law why the word "corporation" does not include a "cooperative." "Whenever the meaning of a word or phrase is defined in any statute such definition is applicable to the same word or phrase wherever it occurs except where a contrary intention plainly appears." SDCL 2-14-4. SDCL 47-15-1 (2) defines "Corporation as "a corporation which is not a cooperative." Section 21 of Article XVII also makes no mention of a "foreign cooperative" although we have a statutory definition of "foreign cooperative" at SDCL 47-15-2 (4). SDCL 47-15-14 permits any "corporation" to "convert itself into a cooperative . . ." Likewise, any "cooperative" may "convert itself into a business corporation . . ." by virtue of SDCL 47-2-4.1. Obviously, if one entity may become something else by taking certain legal steps, such an entity is not "something else" until it has "jumped through the legal hoops." Finally, using any measure of common sense, any person on the street knows that a cooperative is not a corporation. If the people of South Dakota intended to include cooperatives and especially foreign cooperatives in the very broad prohibitions of Amendment E, they could have easily said so. They did not.

The second exemption in South Dakota (Section 22 (2)) deals with certain cooperatives. This is a very curious exemption since, as already explained, cooperatives are not described or listed at all in the general prohibitions contained in Section 21. In other words, there is nothing to exempt. An example comes to mind. The first section of a particular law states, inter alia, that "no person" shall engage in certain activities. The next section of the law exempts "domestic animals." Obviously, such an exemption would be meaningless. Since a cooperative is

not a corporation, is not a syndicate, and is not covered by Section 21, the exemption is meaningless. There is not even a passing reference in Section 21 to cooperatives. The purported exemption as to cooperatives found in Section 22 (2) extends only to agricultural land acquired or leased. Acquired means to own something. Lease means to lease something. The exemption does not state something to the effect of "agricultural land in which an interest has been acquired." The exemption language does not at all track the very broad and extensive language of Section 21, namely to "acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming . . ." The exemption is much more narrow and, if it has any purpose at all, does not exempt the acquiring of easements, options, or other possible interests in real property by cooperatives. In other words, if the exemption means anything, no cooperative may acquire any easement, any option in real estate, or any other possible interest in real estate in South Dakota. The exemption covers only ownership or leasing. Section 21 clearly distinguishes an acquisition (i.e. ownership) from acquiring some other non-ownership interest. If this exemption was held to be effective, it would only apply to cooperatives in which a majority of the shares or other interests are held by members of that cooperative which members are "natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock." The idea, based on the evidence at trial, which apparently

drove this particular exemption (in the minds of one or more of the sponsors only) was to exclude from farming and from ownership of agricultural land in South Dakota the so-called regional or national cooperatives, i.e. cooperatives owned by local cooperatives, the regional cooperatives being such as Farmland Industries, Harvest States-Cenex, Land O'Lakes, Inc., and perhaps others. Such cooperatives are not owned by farmers as such. The question arises, however: how can such entities be excluded from the cooperative exemption when no cooperative, whether "local" or "regional" was covered in the first place by Section 21? This purported exemption is particularly troubling since one cannon of statutory construction is that "legislative enactments should not be construed to render their provisions mere surplusage." Dunn v. Commodity Futures Trading Com'n, 519 U.S. 465, 472, 117 S. Ct. 913, 917, 137 L. Ed. 2d 93 (1997). This cannon "is not an immutable physical law of the universe, but is simply a guide to statutory construction." State Dept. of Assessments and Taxation v. Maryland Nat. Bank, 310 Md. 664, 672, 531 A.2d 294, 298 (1987). There is as well an ancient maxim, Surplusagium non nocet, i.e. surplusage does not harm. "If possible, effect should be given to every part and every word (emphasis supplied)." State ex rel. Oster v. Jorgenson, 136 N.W.2d 870, 875 (SD 1965). It is not "possible" to give Section 22 (2) any effect without first adding the word "cooperative" to Section 21 or finding that a "cooperative" is a "corporation", there being no definition of "corporation" in Amendment E. As stated above, I decline to take either of such radical steps. The provisions of Section 22 (2) are mere surplusage. In the alternative, the section is in conflict with the clear and unambiguous language of Section 21. To repeat: a

"cooperative" is not a "corporation", at least in South Dakota, and there is therefore nothing to exempt in Section 22 (2).

The Nebraska Constitution has no such "cooperative exemption." That, of course, is not surprising since, as already discussed, the Nebraska general prohibition (dealing with corporations) does not mention cooperatives and no cooperative of any kind is circumscribed by the constitutional provision in Nebraska.

South Dakota next exempts "nonprofit corporations organized under state nonprofit corporation law." Does state mean South Dakota? One would assume so. Is the word "law" to be interpreted as plural, thus covering nonprofit corporations from all states? There is no need to determine any of this since no nonprofit corporation is a party. The Nebraska exemption simply states that the provision do not apply to "nonprofit corporations."

The next exemption in South Dakota (Section 22 (4)) is commonly referred to as a "grandfather clause." It is broadly written, much like Section 21. It allows non-family farm corporations and syndicates to do with agricultural land (other than raise livestock as will hereinafter appear) what they were doing on November 3, 1998, the date Amendment E became law. The broad exemption is for agricultural land which "is being farmed, or which is owned or leased, or in which there is a legal or beneficial interest, directly or indirectly owned, acquired, or obtained by a corporation or syndicate, if such land or other interest is held in continuous ownership or under continuous lease by the same such corporation or syndicate." Thus, while the

stockholders or the partners may change, the exemption continues. The exemption as to leased property is not perpetual since no lease of agricultural land for more than twenty years is valid in South Dakota. See SDCL 43-32-2. Language dealing with a contract for deed is included in the exemption although a contract for deed is obviously included in the phrase contained in the first sentence of this particular exemption, namely "a legal or beneficial interest." The language dealing with a contract for deed is mere surplusage.

Nebraska's "grandfather clause" is very similar although it, unlike South Dakota, allows for continuing ownership to meet the requirements of pollution control regulations. Nebraska also includes the surplus language as to a contract for deed.

The next exemption in South Dakota (Section 22 (5)) is the livestock exemption. A non-family farm corporation or syndicate is permitted (1) to continue to own the livestock owned as of November 3, 1998, and (2) to continue to keep or feed livestock under contract as of November 3, 1998, until the contract expires or is terminated. Once any such contract expires or is terminated, the non-family farm corporation or syndicate may no longer acquire or keep and feed livestock. Unless a non-family farm corporation or syndicate had previously entered into a contract with some entity for the keeping and care of livestock, such entity is prohibited from acquiring or dealing with any new or replacement livestock after November 3, 1998. In other words, such entity could not replace the livestock as the livestock die, are sold or slaughtered. Thus, any such non-qualifying entity, even though it is

permitted (by the terms of Amendment E) to continue to own pasture land owned as of November 3, 1998, could not acquire new or replacement livestock to be able to utilize the pasture land. Nor could the non-qualifying entity directly use any of its barns, sheds or shelters for livestock. Nebraska has no such provision. A further very significant problem for non-qualifying owners of pasture land is Article XVII, Section 7, of the South Dakota Constitution: "No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business" (emphasis supplied). Thus, not only may the non-qualifying entity not use its pasture land to raise livestock, the entity may not even continue to own the pasture land since it may not engage in farming.

The next exemption in South Dakota (Section 22 (6)) is for a farm operated for research or experimental purposes but only if any commercial sales from the farm are "only incidental to the research or experimental objectives of the corporation or syndicate." The Nebraska provision is basically the same.

Land leases by alfalfa processors for the production of alfalfa are exempted from Section 21 (Section 22 (7)). Thus, any lease by a non-qualifying entity for the purpose of obtaining alfalfa to feed livestock is prohibited by Amendment E. The Nebraska provision is virtually identical.

There is an exemption for agricultural land operated for the purpose of growing seed, nursery plants, or sod (Section 22 (8)). The Nebraska provision is identical.

Mineral rights on agricultural land (Section 22 (9)), as in Nebraska, are exempted.

The next exemption (Section 22 (10)) is for agricultural land "acquired or leased by a corporation or syndicate for immediate or potential nonfarming (sic) purposes, for a period of five years from the date of purchase." It is clear that no non-qualifying entity having development in mind could own or lease the agricultural land for more than five years. When the five years has expired and the land is still agricultural land, the non-family corporation or syndicate would be in violation of Amendment E and would be required to dispose of the land or terminate the lease. During the five year period, the non-qualifying entity could not use the land for farming except by leasing it (either as the owner of the land or by virtue of a sub-lease of some kind) to a qualified family farm, whether that family farm is incorporated or not. This particular exemption is very narrow. It does track or match, for some unknown reasons, the broad prohibitions expressed in Section 21. In other words, the prohibition in Section 21 is much broader than the exemption in Section 22 (11). The agricultural land must have been acquired, i.e. purchased and then owned, or leased from another entity. The exemption does not authorize easements, options to buy, or any other interest, whether legal, beneficial or otherwise. This means that utility companies such as the three electric utility companies who are parties plaintiff in this case, pipeline companies, municipal corporations wanting to install water lines or sewer lines under agricultural property, railroads, wind power companies, and similar entities could not acquire easements; they would be required to purchase or lease the corridor as well as the sites for

towers, windmills and other structures. However, even with a purchase or lease of the corridor, such an entity could not hold such ownership or leasehold interest for more than five years unless, at the end of the five year period and thereafter, the land was not used for any agricultural purpose.

The language from the Nebraska Constitution is much the same as Section 22 (10), although it refers also to "nonranching (sic) purposes."

The next exemption (Section 22 (11)) allows agricultural land and livestock to be acquired by a corporation or syndicate to enforce a lien or foreclose a security interest or mortgage. Again, the word acquired in this context clearly means to take ownership. The corporation or syndicate has five years to then dispose of the real estate and six months to dispose of the livestock. During the period that the real estate is held it may not be used for farming except under a lease to a family farm corporation, family farm syndicate, nonsyndicate (sic), or noncorporate (sic) farm. The exemption here does not deal with filing or obtaining any statutory lien but only with the enforcement of a lien and thus acquiring the land. It is clear that the exemption is not as broad as the language in Section 21, i.e. "acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise." What any possible rationale there might be for this is unknown to the court. This exemption as written in Section 22 (11) would permit the holder of a mechanic's lien or other statutory lien in effect on November 3, 1998, to foreclose the lien. Because Section 22 (11) authorizes the acquisition (i.e. ownership) of agricultural land or livestock does not mean that the filing or recording of a

lien is permitted. The exemption, however, must be read in conjunction with Section 22 (13) which permits a "bona fide encumbrance taken for purposes of security", language also taken verbatim from the Nebraska provision.

The Nebraska provision comparable to Section 22 (10) is largely identical although no maximum holding period is specified for livestock so acquired.

The next exemption (Section 22 (12)) allows state or nationally chartered banks (without specifying that the bank in question must have legally authorized trust powers and without taking into account that many banks in South Dakota do not have legally authorized trust powers) to act as trustees for persons, corporations or syndicates but only if such persons, corporations or syndicates are already exempt from Amendment E. This constitutional provision overrides certain provisions of the banking and trust company statutory scheme under South Dakota law. This trust exemption as to entities (individual farmers, family farm corporations and family farm syndicates) already not covered by Section 21 tells us that, in the absence of the exemption, no agricultural land (and the exemption does not cover livestock) could ever be placed in or continued in trust by any person or entity engaged in farming or owning agricultural land. Otherwise, there would be no purpose for the exemption. At first blush, a "business trust" (a named prohibited entity in Section 21) probably did not include a so-called living trust or a testamentary trust since "business trust" was rather narrowly defined in SDCL 47-14-1 when Amendment E was adopted. Since then, the definition has been substantially broadened by the South Dakota

Legislature. See 47-14A-1. Thus, the ownership interests in a non-family farm syndicate or stock in a non-family farm corporation may not be placed in or continued in trust, either a so-called living trust or a testamentary trust, regardless of who is acting as trustee. The reason, of course, is that, if any such trust is a "business trust", it is a syndicate pursuant to Section 21 and is prohibited from engaging in farming or owning any interests in agricultural real estate. It is also clear that no farmer or rancher (regardless of the manner in which the farmer or rancher is doing business) may place or retain agricultural land in trust with an individual trustee such as a surviving spouse or child. Livestock may not be placed or retained in trust in any type of trust, regardless of the type of trustee. Some existing trusts in the course of estate planning in South Dakota have been established as irrevocable trusts. One or more of the individual plaintiffs already have agricultural property, real and personal, in trust.

Trusts are commonly used to avoid probate, to save federal estate tax, and to allow the surviving spouse to receive all the income from the farm business enterprise with the farm business enterprise ultimately passing to a child or the children of the farm couple. Trusts holding agricultural real property and engaging in farming have been widely used for many years in South Dakota. Many farmers who established such a trust were already deceased when Amendment E came into being and probate courts had already ordered the establishment of the trusts and the transfers of property to the trusts from the decedents' estates. In many cases, the surviving spouse is already acting as trustee. Others have drawn wills with pour-over provisions into such a trust. Others still alive have

agricultural property already in trust. Having practiced law for 30 years and advised many farmer clients as to estate planning before taking office, I take judicial notice of these facts. As to all these trusts already established or in the process of probate (if a testamentary trust rather than a living trust was used) divestiture would be required by the provisions of Section 24, if Amendment E is constitutional.

There are further trust considerations. Section 21 tells us that the term corporation "means any corporation organized under the laws of any state of the United States or any country." Section 21 does not tell us what syndicate "means." It tells us that the term "includes" certain entities. It does not tell us that trusts, other than "business trusts", are included or excluded. It tells us that "syndicate" does not include general partnerships "except general partnerships in which nonfamily (sic) farm syndicates or nonfamily (sic) farm corporations are members." Again, it does not tell us that certain trusts are "not included" in the definition of a syndicate.

Nebraska has no such separate trust exemption provision, apparently because family trusts are specifically exempted by Section 8(1) of the Nebraska Constitution.

As already noted, there is an exemption (Section 22 (13)) for a "bona fide encumbrance taken for purposes of security." The quoted language was apparently copied from SDCL 47-9A-6 which language has not been interpreted by South Dakota courts. As already noted, Nebraska has an identical provision. This language, on a reasonable reading, authorizes the filing of a lien to

acquire a mechanic's lien and the acquisition of other statutory liens permitted by South Dakota laws. A more careful drafter would have simply exempted acts permitted by South Dakota law in connection with acquiring a mechanic's lien or any other lien granted by South Dakota statutes. For example, we have a trucker's lien for transporting livestock (SDCL 44-11-9), ambulance liens against agricultural real estate of the patient (SDCL 44-13-1) and the patient's spouse (SDCL 44-13-3), crop liens (SDCL 38-17-1 to 38-17-19), possessory liens for trespassing livestock (SDCL Chapter 40-28), veterinarians' vaccination liens (SDCL 40-27-12, et seq.), liens in connection with the sale of livestock (SDCL 44-6-5), the vendor's lien (SDCL 44-6-1) and the vendee's lien (SDCL 44-6-2) against agricultural land, and perhaps other liens. The language used in the exemption could have been written in a more encompassing manner but will be read reasonably to permit an otherwise prohibited entity from acquiring these and other similar statutory liens.

There is an exemption (Section 22 (14)) for custom spraying, fertilizing, or harvesting. Nebraska has identical exemptions. It was the court's first thought that this language would obviate any concerns about a lien being acquired by operation of law as to these three activities, the thought being that Section 22 (13) or, for that matter, Section 22 (11), would not be sufficiently broad to cover such liens. It initially seemed odd to the court to refer to "custom spraying" and "fertilizing" other than the fact that the Nebraska exemption was copied. There are no South Dakota statutory liens for such activities. The concerns of the court initially related to a common rule of statutory construction, namely that once you start down a "laundry list",

confusion may be created. Section 22 (14) is a very short "laundry list." Under the maxim of construction known as expressio unius est exclusio alterius; the express mention in a statute of one thing implies the exclusion of other similar things. Black's Law Dictionary 581 (6th Ed. 1990). The court is now convinced, however, that the language in this exemption does not relate to statutory liens. Instead, it is designed to make it clear that custom spraying, fertilizing, or harvesting of crops do not constitute "farming". The exemption matches, to some extent, SDCL 47-9A-2 (2) of the family farm act, where we are told that farming does not include "a contract whereby a processor or distributor of farm products or supplies provides spraying, harvesting or other farm services."

In Section 22 (15), Amendment E exempts livestock futures contracts, livestock purchased for slaughter within two weeks of the purchase date, "or" livestock purchased and resold within two weeks. Nebraska exempts livestock futures contracts, livestock purchased for slaughter (which is an exemption much broader than that of South Dakota), "or" livestock purchased and resold within two weeks.

Nebraska exempts "Nebraska Indian tribal corporations." South Dakota has no such exemption. There are no provisions for Indian tribal corporations, as such, under South Dakota law. Tribes incorporate entities under general South Dakota law, either as a business corporation or as a non-profit corporation. Clearly, the State of South Dakota has no authority to regulate what the various tribes do in Indian Country in the use or ownership of agricultural land.

Nebraska exempts agricultural land operated by a corporation for the purpose of raising poultry. South Dakota has no such exemption.

As provided by Section 23, a family farm corporation or family farm syndicate that is qualified and later ceases to meet the requirements of Amendment E must be dissolved. However, if a majority of the stock in the non-qualifying corporation or the majority interests in the non-qualifying syndicate are held by persons related to one another within the fourth degree of kinship or their spouses, the non-qualifying entity may retain the land for twenty years but may not increase the land holdings. The Nebraska provision is virtually identical except the holding period is fifty years rather than twenty.

By virtue of Section 24, all corporations and syndicates owning agricultural land or engaging in farming are required to file an annual report. This includes all such corporations and syndicates, whether family farms or not. The Attorney General is mandated to bring lawsuits to "enjoin any pending illegal purchase of land or livestock." This is a daunting task indeed to expect the Attorney General to know of all pending illegal purchases or acquisitions. The Attorney General is also mandated to bring lawsuits to force divestiture of land or livestock held in violation of Amendment E. State court judges are directed to order any land held in violation of Sections 21 through 24 to be divested in two years. If the court's order to divest in two years is not accomplished, the court is directed to order that the land is to escheat to the state. One must assume that these provisions do not override the grace period extended by Section 23 as to non-qualifying entities

(which were at one time qualified) to divest in twenty years. The state court judge is to order divestiture of livestock within six months.

Nebraska has a similar provision although the Nebraska Attorney General must have "reason to believe" that a violation is occurring before taking action.

Admittedly, the court could be criticized for discussing Amendment E language not directly impacting one or more of the present plaintiffs. I fully recognize that decisions should not be written in the manner of law review articles or advisory opinions. I have, however, already provided to the parties my thoughts on what Amendment E says; they are fully aware of that and at that point I had not made a decision as to what portions of the language would become important in the court's decision. There is a further and more important reason: the court, as will hereinafter appear, is required to perform a balancing test, comparing putative local benefits of Amendment E with the burdens imposed on interstate commerce.

DECISION

I. Cooperatives

Plaintiff Donald Tesch ("Tesch") owns a 1000 head hog confinement facility in South Dakota. He finishes hogs under a contract with Harvest States Cooperative, a regional cooperative. Harvest States provides Tesch with hogs weighing 40-65 pounds and he feeds them out to 240-265 pounds. Harvest States owns the hogs that Tesch feeds in his barns. If Tesch is required to own the

animals that he feeds, he will require $ 350,000.00 to $ 450,000.00 each 18 week cycle to purchase the hogs. He has requested such financing from many banks; no bank has been willing to lend him money to buy his own hogs.

Tesch's ten year contract with Harvest States expires in 2006. Because of Amendment E, Tesch has been notified by Harvest States that the contract cannot be renewed. Tesch comes before the court alleging that Amendment E may prohibit him from doing business (as he is now doing) with Harvest States.

Mr. Tesch and Farm Bureau members are entitled to an answer as to cooperatives, regardless of whether Amendment E violates the United States Constitution, and I will provide that answer.

Based on my previous discussion of whether or not cooperatives are included in Amendment E, it is clear that Tesch may continue to do business with a cooperative, local or regional, and that Amendment E does not prohibit what he has been doing and apparently intends to continue to do. Given this interpretation of the law, there is nothing to enjoin as to Tesch or South Dakota Farm Bureau on behalf of its members who are in similar circumstances as Tesch.

II. ADA

The Eighth Circuit has held that private individuals can in fact sue state officials under the ADA for prospective, injunctive relief only. Grey v. Wilburn, 270 F.3d 607, 609 (8th Cir. 2001). The Eighth Circuit held in Gibson v. Arkansas Department of Correction, 265 F.3d 718, 720 (8th Cir. 2001) (quoting Seminole

Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)):

The Eleventh Amendment is not a bar to "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'"

The foregoing principle is equally applicable to non-employment claims based on Title II of the ADA. Klingler v. Director, Dept. of Revenue, 281 F.3d 776, 776 (8th Cir. 2002), and Randolph v. Rodgers, 253 F.3d 342, 347-48 (8th Cir. 2001).

My prior order (which was not, of course, a final order) dismissing plaintiffs' ADA claim, which was issued prior to Gibson and Grey, is in error and should be rescinded.

The allegations as to claims under the ADA in the original complaint are somewhat confusing and contradictory. It could be argued that only Farm Bureau has advanced such claims. "For an association to have Article III standing to bring suit on behalf of its members, 'the interests at stake must be germane to the organization's purpose.'" Central South Dakota Co-op. Grazing Dist. v. Secretary of U.S. Dept. of Agriculture, 266 F.3d 889, 897 (8th Cir. 2001) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Services, 528 U.S. 167, 181, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000)). There is no evidence in the record to support associational standing as to the ADA claims by Farm Bureau, perhaps because of the erroneous previous ruling made by the court. Farm Bureau, however, like the Farmers' Union, broadly represents farmer

members' interests before legislative and other bodies on a routine basis. The court takes judicial notice of this. Representing the claims of presently "disabled farmers" who are members of Farm Bureau and farmer members yet to become disabled may be something of a "stretch" but the court will allow the associational standing. It makes no difference, in any event, since ADA claims of plaintiffs Frank Brost ("Brost") and Marston Holben ("Holben") were submitted at trial as offers of proof which offers of proof are now accepted by the court. The court also construes the ADA allegations in the original complaint as including Brost's and Holben's claims.

Brost owns a ranch in Western South Dakota, lives about two hours drive away from his ranch and, at the time of trial, had not been to the ranch for six weeks. Brost is 65 years old and is physically unable to do the physical activities required to maintain the ranch or any other strenuous physical labor. He has had serious heart problems, underwent surgery shortly before the trial, and was unable to even travel from his home near Rapid City to the place of trial. Brost does the planning, marketing, and financing. He is the final decision-maker for the ranch. Physical labor required to run the ranch is performed by his ranch foreman, David Newbold ("Newbold").

Brost's ranch is owned by four separate entities. The first entity is Brost Land and Cattle Company, a South Dakota corporation incorporated in 1979. Brost is the sole shareholder. This corporation owns 3,100 acres of agricultural land, all of the equipment involved in the cattle operation, and most of the cattle.

The second entity is the Frank Brost Limited Partnership which owns land that Brost inherited from his parents. He is the general partner while his three sons each have a 1.5% ownership share. As part of his estate planning, Brost planned to gift each year a portion of this limited partnership to his three children. One of Brost's sons works for General Mills and lives in Minneapolis. Another son lives in Sioux Falls and works for Gateway. A third son teaches and lives in Rapid City. None of the sons take any part in the management or physical operation of the ranch.

The third entity is the Brost/Newbold Limited Liability Partnership, formed in 1998 as a "retirement plan bonus" for Brost's ranch foreman, David Newbold. Brost owns 88% of the partnership interests, Brost Cattle Company owns 1%, and Newbold owns 11%. Brost gifts $ 10,000.00 worth of units in the partnership to Newbold each year as an incentive to keep Newbold employed. This limited liability entity owns 2,080 acres of ranch land.

Brost also owns land and cattle personally. There are no buildings of any kind on the land owned by the Brost Limited Partnership or on the land owned by the Brost/Newbold Limited Liability Partnership. There is no residence on the land owned by Brost Land and Cattle Company.

The cattle owned personally and by the corporation are fed to 600-800 pounds and then sold primarily to livestock feeder operations to be finished. The cattle must be owned for more than two weeks (thus not qualifying for any possible exemption from Amendment E) in order to feed them out to 600-800 pounds.

Brost transferred ownership of his ranch land, livestock, and equipment to limited liability entities in order to obtain financing. The banks that he does business with would not loan him money unless ownership of the ranch was held in a limited liability format. If Brost is forced to divest himself, he will pay significant capital gains taxes of at least $ 400,000.00. Financially, Brost would be unable to continue owning the ranch if he cannot own it in a limited liability format.

Mr. Holben lives in Phoenix, Arizona. He and his wife created a living trust in which they are the trustors, trustees, and beneficiaries. The trust owns all stock in Spear H Ranch, LLC. Spear H Ranch consists of 2,600 acres of grassland in Butte County, South Dakota. Holben's South Dakota residence is between 45 and 50 miles from the ranch. He spends up to eight months a year in Arizona and the remaining time in South Dakota. There is no residence, no running water, and no electricity on the land owned by Spear H Ranch.

The Holben LLC owns steers which feed on the grassland. These steers are owned for more than two weeks at a time. They are bought in the Spring and sold in the Fall.

Holben does not and cannot do day-to-day labor on the ranch. He is absent from the ranch for at least two to three weeks at a time. He is absent when he is living in Arizona. Due to 1989 heart bypass surgery, Holben is unable to do any strenuous work on the ranch or anywhere else. He contracts out fence repair and hires cowboys to do all the physical cowboy work, such as checking cattle, rounding up cattle who stray, and

tending to the animals' medical needs. The only physical work (if it can even be called that) Holben is able to do consists of riding into the pasture on a horse or all-terrain vehicle to count the cattle and check for pink eye. Clearly, these limited activities do not meet the requirements of any Amendment E exemption.

Title II of the ADA provides, in part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from partici pation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. That provision does not limit the ADA's coverage to conduct that occurs in the "programs, services, or activities" of the State but is instead a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context." Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 45 (2nd Cir. 1997), overruled on other grounds by Zervos v. Verison New York, 252 F.3d 163, 171 n.7 (2nd Cir. 2001).

"Title II applies to anything a public entity does. Title II coverage, however, is not limited to 'Executive' agencies, but includes activities of the legislative and judicial branches of State and local governments." 28 CFR Part 35 Appendix A, --Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services (Published July 26, 1991). At least two circuits have held that Title II of the ADA applies to zoning decisions made by a city. See Innovative Health Systems, Inc. v. City of White Plains, supra, and Bay Area Addiction Research and Treatment, Inc., 179 F.3d 725, 730 (9th Cir. 1999). Zoning ordinances are analogous to Amendment E.

Zoning ordinances limit how property may be used and, indirectly, who may use the property. Amendment E limits the use of South Dakota agricultural land (prohibiting its use for farming) by disabled individuals (those who cannot do substantial physical exertion on a daily basis) who own the land in a limited liability format.

South Dakota may legislatively place certain restrictions on how property is used. The State may legislatively place certain restrictions on who may use property. The State may not, however, base those restrictions on impermissible categories such as religion, race, gender, and, under the ADA, disability.

A corporation, of course, cannot have a disability. "It is well established that a shareholder or officer of a corporation cannot recover for legal injuries suffered by the corporation." Audio Odyssey, Ltd. v. Brenton First Nat. Bank, 245 F.3d 721, 729 (8th Cir. 2001). "The rule applies even to a corporation's sole shareholder." Id. However, the foregoing "'shareholder standing rule' does not apply when the alleged injury is distinct from that suffered by the corporation or other shareholders." Id. "A 'distinct' injury is one in which the claimant's rights have been violated, not merely one in which the claimant is indirectly harmed because of one party's injury to another." Id. Amendment E does more than place limits on limited liability entities; it prohibits disabled persons who cannot live "on the farm" from owning South Dakota agricultural land in a limited liability format and using such land for farming. Non-disabled persons are not so limited.

The Supreme Court has made it clear that the ADA

"addresses substantial limitations on major life activities, not utter inabilities." Bragdon v. Abbott, 524 U.S. 624, 641, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998). A person is substantially limited in working if he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Because disability is determined on a case-by-case basis, "[a] court must ask whether the particular impairment constitutes for the particular person a significant barrier to employment." Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996) (internal quotation omitted).

Moysis v. DTG Datanet, 278 F.3d 819, 825 (8th Cir. 2002). As in Moysis, "this is not a case, then, in which plaintiff's condition causes difficulty with a single aspect of a single job position." Moysis v. DTG Datanet, 278 F.3d at 825 (quoting Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 680 (8th Cir.2001)). Brost and Holben are physically unable to perform all of the physical labor required to raise livestock on their South Dakota ranch land. Performing substantial physical exertion is a prerequisite under Amendment E to engaging in farming as a member of a limited liability entity. Some member of the entity must be a non-disabled individual or a person who lives "on the farm." The only member of the Brost Land and Cattle Co. Inc. is a disabled individual. A non-disabled farmer need not live on the farm. A disabled farmer would be required to live on the farm to be able to conduct business in a limited liability format. People who are disabled obviously tend to prefer to live in or very near larger communities with health care facilities able to promptly

and easily meet their medical needs. There is no such facility in or even near Lyman County, South Dakota, the location of the Brost ranch. Brost would be hours away from medical care he needs.

Amendment E harms Brost and Holben individually in their abilities to own and use agricultural land in a limited liability format. They have shown a distinct injury from that of the entities in which they own an interest.

Brost's and Holben's farming activities do not qualify under the "grandfather clause" because, as discussed previously, they purchase cattle in the spring, which cattle would not be "grandfathered." The effect of Amendment E, as discussed above, is to prevent those individuals who cannot live on the farm or perform "both daily or routine substantial physical exertion and administration" from owning in a limited liability format South Dakota agricultural land for the feeding of livestock if such livestock are purchased in the spring and sold in the fall. Those individuals not only could not engage in the occupation of raising cattle; they would have to dissolve their limited liability entities or sell their grass land. Plaintiffs have shown that Amendment E constitutes an attempt to override the ADA.

Any state law and state constitutional provision which conflicts with federal law is preempted under the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, cl. 2. Congressional intent to preempt state law can either be expressed in statutory language or implied in the structure and purpose of the federal law in question. Cipollone v. Liggett Group,

Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992).

State law is "pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. South Dakota Min. Ass'n, Inc. v. Lawrence County, 155 F.3d 1005, 1009 (8th Cir. 1998) (citing California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987)) (emphasis in original). Amendment E directly collides with the ADA. It is impossible for the defendants to enforce and comply with Amendment E without violating the ADA. As has been stated: "We first note that we know of no authority for the proposition that a law that is facially invalid under the Commerce Clause may nonetheless be upheld 'as enforced.'" Ben Oehrleins & Sons & Daughter v. Hennepin County, 115 F.3d 1372, 1383 (8th Cir. 1997). The same principle should be applied to Amendment E, the provisions of which cannot be severed to delete the offending language as to the ADA.

"Where a state statute conflicts with, or frustrates, federal law, the former must give way." CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663, 113 S. Ct. 1732, 1737, 123 L. Ed. 2d 387 (1993). Article XVII, sections 21-24 of the South Dakota Constitution are, in part, contrary to the Supremacy Clause of the United States Constitution. Amendment E is therefore void. As previously discussed, since unconstitutional provisions of the South Dakota Constitution cannot, as a matter of law, be severed, the entirety of Amendment E must

fall.

III. Commerce Clause

Montana-Dakota Utilities Company, Northwestern Public Service Company and Otter Tail Power Company are collectively known as the Big Stone Partners. Together they own and operate the very large Big Stone Power Plant in South Dakota (Big Stone I). The percentage of ownership of the plant changed in the mid 1980's, reflecting changing power usages by the individual partners.

Land owned in conjunction with the power plant includes farm land not directly being used for power production activities. This land is leased to local farmers and generates income of approximately $ 15,000.00 - $ 20,000.00 annually. The land is clearly necessary to present and future operations of the power plant.

If the partners again wish to change the percentage of ownership interests to reflect a changing trend in usages, they would no longer qualify under the grandfather provisions. Amendment E would require the newly configured partners to divest that portion of the land owned by the partners which is unimproved agriculture land. Divestiture would result in loss of income to the partners. Amendment E effectively precludes the partners from ever changing the percentage of ownership of the power plant site.

The partners are in the process of preparing to build a second power plant (Big Stone II). Big Stone II will be physically located on land already owned by the

partners. The cooling pond will be located on land yet to be acquired. Big Stone II will not be owned by the current Big Stone Partners. Land now owned by the Big Stone Partners will have to be conveyed to the new owners of Big Stone II. Amendment E prohibits any limited liability entity, including the Big Stone Partners, from owning, leasing, acquiring an easement, or acquiring an option to purchase real estate "used for farming" in South Dakota, unless such ownership pre-existed Amendment E and is allowed under the grandfather clause. The ownership interests associated with Big Stone II would not fall under the grandfather clause. It takes between five and ten years to develop and build a power plant. Thus, the owners of Big Stone II would not be able to purchase and own the land for the construction of the plant unless they can convert the land into the plant facility within five years. If they exceed that deadline, Amendment E would require divestiture.

Big Stone II will require the acquisition of new transmission power line corridors over South Dakota agricultural land and such corridors will extend into other states. The exemption in Section 22 (10) of Amendment E for agricultural land "acquired or leased by a corporation or syndicate for immediate or potential nonfarming (sic) purposes" does not exempt from Amendment E and therefore permit easements, options to buy, or any other interest, whether legal, beneficial or otherwise. Again, the exemption for some unknown illogical reason was not drawn to "track" the broad prohibitions contained in Section 21. This means that utility companies such as the three electric utility companies who are parties plaintiff in this case could not acquire easements; they would be required to

purchase or lease the corridor as well as the sites for any structures such as high-line towers. The purchase of land within the corridor for a transmission line tower is two to three times more expensive than the purchase of a mere easement. Even with the purchase or lease of the corridor, the utility companies could not retain such ownership or leasehold interest for more than five years unless, at the end of the five year period and thereafter, the land was not used for any agricultural purpose. The corridors thus could not be farmed by the local farmers. The agricultural land would necessarily lay fallow. Utility companies would incur the expense of hiring someone to keep the weeds at bay, in perpetuity. Where those corridors run through pasture land, fences would have to be erected by the utilities to prevent grazing, an activity which is clearly included in the definition of farming.

Because of the Amendment E restrictions on use of corridors, it is unlikely that those who own and farm South Dakota agricultural land would voluntarily sell transmission line corridors to the utilities or to others seeking corridors, such as pipeline companies, wind power companies, railroads, and other entities. The farm family would have to sell (or lease for a limited number of years, not to exceed 20) the 120 foot wide corridor through the farm property, thus dividing the farm property. With the corridor being fenced, the farmer would, in the absence of gates, be prohibited from passing through the corridor to gain access to the remaining portion of the farm. If the farm family did agree to sell or lease such a corridor, they would be creating two separate fields or pastures, requiring two separate ingress roads and, in the case of pasture land, perhaps two separate sources of water. It is unlikely

that farmers would agree to this without exacting an exorbitant fee, if at all. Condemnation would likely be required in virtually every case, substantially increasing the cost of doing business in an industry where a profit is guaranteed by virtue of rates charged consumers. Without question, state regulatory bodies will permit if not require that these costs of doing business be passed on to utility customers. Thus, higher rates would be spread among all customers of the utility companies, regardless of where the customers live, inside or outside South Dakota.

Otter Tail Power Company, which has its principal place of business in Fergus Falls, Minnesota, has interstate transmission lines between South Dakota and other states and serves customers in both South Dakota and Minnesota. Likewise, Montana-Dakota Utilities Company serves customers inside and outside South Dakota.

The Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution authorizes Congress "to regulate commerce . . . among the several States." Thus, Congress has been granted the power to so regulate, necessarily restricting the power of any state to regulate interstate commerce. Plaintiffs contend that the limited liability organization farming ban in Amendment E violates the dormant Commerce Clause. The U.S. Supreme Court has recognized a dormant Commerce Clause which limits an individual state from adopting "regulations that discriminate against interstate commerce." West Lynn Creamery, Inc., v. Healy, 512 U.S. 186, 192, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994). As I explained in American Meat Institute, et al. v. Barnett, 64 F. Supp.2d 906, 917 (D.S.D. 1999):

The Dormant Commerce Clause "prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." West Lynn Creamery, Inc., v. Healy, 512 U.S. 186, 192, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994), quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-274, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988).

In judging Constitutional challenges to state statutes under the Dormant Commerce Clause, the U.S. Supreme Court has developed a two-tier approach. Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 578-579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986). The first tier is simple enough. If the challenged state statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the U.S. Supreme Court has "generally struck down the statute without further inquiry." Id. at 579, 106 S. Ct. 2080. The United States Court of Appeals for the Eighth Circuit, in explaining this tier, teaches that "a state regulation is per se invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state." Cotto Waxo Company v. Williams, 46 F.3d 790, 793 (8th Cir.1995).

A state statute that directly regulates or discriminates against interstate commerce is subject to strict scrutiny. Maine v. Taylor, 477 U.S. 131, 138, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986). To withstand the Constitutional challenge, the state must show "that the statute serves a legitimate local purpose unrelated to economic protectionism and that the purpose could not

be served as well by nondiscriminatory means." Cotto Waxo, 46 F.3d 790 at 793, citing Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). Therefore, if the . . . statute is found to directly regulate or discriminate against interstate commerce, strict scrutiny applies and the statute can only be upheld upon a significant showing by the state that it is not striving for economic isolation.

The second tier approach is utilized when a state statute only indirectly affects interstate commerce and regulates evenhandedly. Brown- Forman Distillers Corporation v. New York State Liquor Authority, 476 U.S. 573 at 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986). The inquiry is whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. Id., citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). This balancing test weighs the burdens of the statute on interstate commerce with the putative local benefits. Cotto Waxo, 46 F.3d at 793. If the burden on interstate commerce is slight and the public benefit is great, then the statute can be upheld.

The Court must first determine if the . . . statute directly regulates or discriminates against interstate commerce. If so, then tier I is applied and the statute is per se unconstitutional and it can be saved only by a tremendous showing by the state of its local benefit and the absence of any other means to achieve that benefit. If the statute indirectly affects interstate commerce, then tier II applies. The Court must then balance the burdens on interstate commerce with the local benefits. If the benefits are greater, then the statute does not violate the Dormant Commerce Clause. . . . In addition,

the United States Court of Appeals for the Eighth Circuit teaches that the Dormant Commerce Clause invalidates state statutes which require people or businesses to conduct their out-of-state commerce in a certain way. Cotto Waxo, 46 F.3d at 793 (citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, and Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552, for that proposition). If a state statute requires out-of-state commerce to be conducted according to in-state terms, then the statute burdens interstate commerce. Cotto Waxo, 46 F.3d at 793 . . .

Brown-Forman teaches us or reaffirms a number of legal principles already discussed. As we analyze state economic regulation under the Dormant Commerce Clause, the critical consideration for the court is the overall effect of the state law on both local and interstate activity. Any state statute that directly regulates interstate commerce is to be struck down without further inquiry. However, a statute having only indirect effects on interstate commerce and which regulates evenhandedly is to be examined in the context of whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. There is no clear line which separates the category of state regulation that is virtually per se invalid under the Dormant Commerce Clause and the category subject to the Pike v. Bruce Church balancing approach . . . Negatively affecting interstate commerce is not the same as discriminating against interstate commerce.

Plaintiffs contend that Amendment E fails the "first

tier" of the Brown-Forman test, the "discrimination" tier. "'Discrimination' for purposes of the Commerce Clause means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1383 (8th Cir. 1997) (quoting Oregon Waste Sys. Inc. v. Department of Envtl. Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 1350, 128 L. Ed. 2d 13 (1994)). "A state law may discriminate against interstate commerce on its face, in its purpose, or in its effect. SDDS, Inc., 47 F.3d 263 at 267." Ben Oehrleins, 115 F.3d at 1383.

Plaintiffs contend that Amendment E is facially discriminatory and thus unconstitutional under the dormant Commerce Clause based upon a reading of the exceptions set forth in Sections 22 (1) through 22 (15) which exceptions, plaintiffs claim, "have the consequence of securing to South Dakota farmers many of the benefits of a limited liability format while denying farmers or farm investors in neighboring States such benefits." Certainly, a reading of exceptions to a statute may demonstrate a "pattern of parochialism apparent in [the] statute" which would demonstrate a purpose to discriminate against interstate Commerce. Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 676 n. 22, 101 S. Ct. 1309, 1319 n. 22, 67 L. Ed. 2d 580 (1981).

Amendment E grants farmers who are South Dakota residents and live on the farm (or who have a family member who lives on the farm) leeway in controlling decisions about their limited liability formats; this leeway is denied to a non-resident disabled farmer who, for example, lives just across the state line but wishes

to own and manage farm land in South Dakota in a limited liability format. This is in the nature of mere surplusage since the court has already found clear violation of the ADA. A farmer living in a distant state who owns South Dakota farm land would be unable to comply with the exceptions for those who live on the farm or perform daily substantial physical labor. Such farmer would be able personally to do neither in a limited liability format. By the same token, a person engaged in agriculture who lives in Aberdeen, for example, and wishes to manage farm land in Lyman County also could personally not do business in a limited liability format. Thus, there is no inherent discrimination in the context of the dormant Commerce Clause against non-resident non-disabled farm land owners. In that sense, Amendment E is not subject to strict scrutiny since it serves a legitimate local purpose unrelated to economic protectionism.

"Extraterritorial reach invalidates a state statute when the statute requires people or businesses to conduct their out-of-state commerce in a certain way." Cotto Waxo Co. v. Williams, 46 F.3d at 793. "[A] statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms." Id. at 794. Amendment E does not require out-of-state limited liability entities to conduct their commerce according to South Dakota's terms. While Amendment E may affect their participation in interstate commerce, Amendment E itself is indifferent to commerce occurring out-of-state. Foreign limited liability entities are able to conduct their out-of-state commerce regardless of their relationship to South Dakota. Id. I conclude that Amendment E does not suffer from an unconstitutional extraterritorial reach as

to out-of-state farmers or out-of-state limited liability entities.

Plaintiffs claim also that Amendment E is targeted at the livestock industry and it is therefore inherently an attempt to regulate interstate commerce, which regulation, Brown-Forman teaches us, is a violation of the dormant Commerce Clause. There was some evidence at trial that Amendment E was motivated by discriminatory purposes. Discriminatory purpose can be established by direct evidence, such as the language of the measure itself or the rhetoric of the legislative history of the measure. Since the initiated measure was adopted, the "pro" statement in the state sponsored ballot pamphlet is the most important. SDDS, Inc. v. State of South Dakota, 47 F.3d 263, 270 (8th Cir. 1995). The legislative history of Amendment E includes a pamphlet widely circulated by the Secretary of State which sets forth a pro-amendment and an anti-amendment position. Part of that pamphlet argues that voters should protect South Dakota from out-of-state interests. This is clearly some evidence of discriminatory purpose. The expressed purpose, however, is more broad, namely to retain family farms and to prevent limited liability entities, regardless of their home base, from gaining control of the food supply. I decline to find sufficient discriminatory purpose.

Plaintiffs also contend that Amendment E is discriminatory in its effect. "Negatively affecting interstate commerce is not the same as discriminating against interstate commerce. In a Commerce Clause context, 'discrimination' means differential treatment of in-state and out-of-state economic interests that

benefits the former and burdens the latter." Cotto Waxo Co. v. Williams, 46 F.3d at 794. Plaintiffs contend that Amendment E "has the effect of excluding corporate investors from raising or finishing livestock in South Dakota since such investors cannot satisfy the narrow family farm exception of Section 22(1)." While Amendment E prevents out-of-state limited liability entities from raising livestock in South Dakota, it does not prevent them from raising livestock elsewhere. In that sense, Amendment E does not affect how these entities conduct business outside South Dakota. Evidence was presented that Amendment E has prevented millions of dollars of commercial development, to the permanent detriment of the economy in South Dakota. While the cost of doing business in South Dakota may have risen for all concerned, namely both in-state and out-of-state limited liability entities, and while that may suppress future development in South Dakota, that does not translate into unconstitutional discrimination and the contentions of the plaintiffs in this regard are rejected.

Plaintiffs suggest that the State's claimed interests as to Amendment E cannot be considered "compelling." In 1982, Nebraska voters adopted an amendment to the Nebraska Constitution, the objective being to prohibit non-family farm corporations from owning and operating Nebraska farm and ranch land. The United States Court of Appeals for the Eighth Circuit, in the context of an equal protection challenge, held that Nebraska's purpose in enacting this somewhat similar corporate farming ban (although clearly considerably narrower than Amendment E) "represents a legitimate state interest under the equal protection clause (citing cases)." MSM Farms, Inc. v. Spire, 927 F.2d 330, 333

(8th Cir. 1991). The conclusion was: "The people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land. It is not for the courts to second-guess the wisdom of this judgment. The equal protection clause is satisfied if the law adopted through the initiative process is rationally related to a legitimate state interest. The district court properly applied this test . . . and its judgment upholding the law is hereby affirmed." Id. at 335. The case from Nebraska did not involve challenges under the dormant Commerce Clause. The evidence presented in court, the court's knowledge of the economic hardships endured by family farmers in competing with large "other players" in agriculture, and the evidence of fears of spoilation of the environment by entities in which the owners are sheltered from personal responsibility all show not only a legitimate state interest but a compelling state interest.

Plaintiffs contend, nonetheless, that this Court should reject the rational basis test applied in MSM Farms and instead apply a "rational basis with bite" standard. Plaintiffs cite Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), in support of this claimed new heightened scrutiny standard. Romer did apply the traditional rational basis test but concluded that the Colorado amendment "lacks a rational relationship to legitimate state interests," Id. at 632, 116 S. Ct. at 1627, because a "desire to harm a politically unpopular group [homosexuals] cannot constitute a legitimate governmental interest." Id. at 634, 116 S. Ct. at 1628.

Plaintiffs argue that Romer stands for the proposition

that where a statute identifies persons by a single trait, in this case a limited liability business format, heightened scrutiny must be applied -- a "breadth" test. Plaintiffs claim that the limited liability ban on farming is over-broad in that it will prohibit real family farmers, such as the individual plaintiffs, from continuing in their business. While this might be true (as to continuing in business) in the absence of the court striking down Amendment E, it is of no legal consequence. Romer does not stand for the proposition advanced by plaintiffs.

In MSM Farms, no argument was advanced that the measure involved "any suspect classifications." Disabled persons have not yet been held by the courts to constitute a "suspect classification." A permanently disabled person, however, like persons of a particular gender, race, or national origin cannot change his or her status. Suffice it to say that this court is suspicious of classifications based on being permanently disabled as distinguished from robust health and fitness.

In 1932, North Dakota voters adopted an initiated measure which required corporations, both domestic and foreign, to dispose of agricultural land within ten years. The United States Supreme Court held that the "fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it." Asbury Hospital v. Cass County, N.D., 326 U.S. 207, 211, 66 S. Ct. 61, 63, 90 L. Ed. 6 (1945). Even legislation excluding a corporation from continuing in the state, which legislation is subsequent to the corporation's acquisition of property, can be sustained. Id. at 211-12, 66 S. Ct. at 63-64. Asbury Hospital further held that the

North Dakota statute's exclusion for farm corporations did not deny equal protection. Id. at 213, 66 S. Ct. at 65. "Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it." Asbury Hospital, 326 U.S. at 215, 66 S. Ct. at 65. No issue was raised or decided as to the dormant Commerce Clause.

Amendment E, like similar limited liability entity farming bans in North Dakota and Nebraska, appears to be designed to prohibit large corporations, which already largely control the ultimate processing and distribution of agricultural commodities, from vertically integrating an industry to the competitive exclusion of the traditional family farmer. "It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community, and such statute is rationally related to a legitimate state interest." State ex rel Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 806 (Mo. 1988) (citing Asbury Hospital and Omaha National Bank v. Spire).

None of the foregoing, however, is the end of the inquiry. Regulating or more correctly over-regulating interstate utility corridors and very likely excluding new investments in electric and wind power generation and transmission facilities intended for interstate use could constitute direct regulation of interstate commerce by South Dakota rather than by the Congress. A state measure that directly regulates

interstate commerce is subject to strict scrutiny and the State would then be required to show that the measure serves a legitimate local purpose unrelated to economic protectionism and that the purpose could not be served as well by nondiscriminatory means. Amendment E stems from a degree of economic protectionism which can well be accomplished by exempting utilities from any such regulation. All of this has to do with the "first tier."

The court, however, need not cross the "first tier bridge" and chooses to rely on the so-called "second tier" approach, the Pike v. Bruce Church, Inc. balancing test. The inquiry is then whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the putative local benefits. This proceeds on the assumption that the measure only indirectly affects interstate commerce and regulates evenhandedly. In a sense, it does since South Dakota based utilities operating only intrastate are as much "ham-strung" by Amendment E as non-South Dakota based utilities. As to utilities, interstate pipeline companies, wind power generators with needed interstate transmission lines, interstate railroads, and interstate communication companies, Amendment E clearly places a substantial burden on interstate commerce. It will greatly increase the costs of the described companies doing business in South Dakota as well as in other states where the companies do business. Any new corridors acquired for transmission lines or pipelines or any other industrial purpose cannot be farmed (as has historically been done, usually by the fee owner farmer without cost to the utility) and these companies will thus incur substantial annual additional costs to comply with other laws and to keep weeds

under control. Utility rates in South Dakota and elsewhere, including certainly Minnesota, will undoubtedly increase. South Dakota is a prime location for the generation of wind power. Other states need that power.

This case is akin to Kassel v. Consolidated Freightways, 450 U.S. 662, 669, 101 S. Ct. 1309, 1315, 67 L. Ed. 2d 580 (1981), where the United States Supreme Court struck down an Iowa law setting truck length limitations which prohibited 65 foot "doubles" from using Iowa highways. If Iowa was allowed to prohibit them, it would affect interstate commerce going from Illinois to Nebraska on Interstate 80. The Supreme Court held that the law substantially burdened interstate commerce because diverting semis around Iowa engendered inefficiency and added expense. Id. at 674, 101 S. Ct. at 1318. "[A] State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it." Id. at 678, 101 S. Ct. at 1320.

Similarly, if South Dakota is allowed to prohibit easements for transmission lines, whether for electricity, wind power, water, or natural gas, running through South Dakota to connect two states on either side of South Dakota, causing greatly increased costs to utilities and other companies, interstate commerce would be greatly affected.

There is no legitimate state interest of any kind in burdening utilities or rate payers or, for that matter, owners of agricultural land, with any of this "utility business." Claims were made that no such effects were even intended. It is undisputed that there is no

rationality to the matter of prohibiting these easements. It is, of course, impossible to know what the voters intended. We are, however, left with what the measure says, not what voters or others now wish it might say.

Performing the required "balancing test", Amendment E violates the dormant Commerce Clause of the United States Constitution. The burdens imposed on interstate commerce are clearly excessive in relation to the putative local benefits. This is true whether the utility provisions are balanced against the putative benefits of Amendment E in toto or vis a vis the lack of an exemption for utility enterprises.

Plaintiffs have sought a permanent injunction to prohibit the defendants from enforcing or attempting to enforce Amendment E. This would be an idle act, no enforcement of Amendment E having been attempted at this stage other than the passage of certain rules. State officials and certainly the defendants will follow the terms of any court order and this court should not lightly enjoin state elected officials. Thus, the request for an injunction should be denied.

The foregoing constitutes the court's findings of fact and conclusions of law.

ORDER

Based upon the foregoing,

IT IS ORDERED:

1. Plaintiffs' request for a declaratory judgment herein

is granted.

2. Article XVII, Sections 21 -24, of the South Dakota Constitution are unconstitutional and unenforceable.

4. Plaintiffs' motion for injunctive relief is denied.

Dated this 16th day of May, 2002.

BY THE COURT:
CHARLES B. KORNMANN

United States District Judge

JUDGMENT

This action came on for trial before the Court, Honorable Charles B. Kornmann, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, it is hereby

ORDERED AND ADJUDGED that the plaintiffs' request for a declaratory judgment is granted. Article XVII, Sections 21- 24 of the South Dakota Constitution are declared unconstitutional and unenforceable.

IT IS FURTHER ORDERED, the plaintiffs' motion for injunctive relief is denied.

Dated this 17th day of May, 2002.

Nos. 02-2366/02-2588/02-2644/02-2646

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

South Dakota Farm Bureau, Inc., et al.,
Appellees,

vs.

Joyce Hazeltine, et al.,
Appellants,

Dakota Rural Action; South Dakota Resources Coalition,
Intervenors.

October 31, 2003, Decided

OPINION: Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Wollman took no part in the consideration or decision of this matter.

October 31, 2003

Nos. 02-2366, 02-2588, 02-2644, 02-2646

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

South Dakota Farm Bureau, Inc., et al.,
Appellees,

vs.

Joyce Hazeltin, et al.,
Appellants/Cross-Appellees.

September 26, 2003, Decided

OPINION: The motion by Community Environmental Legal Defense Fund, Inc., Pennsylvania Farmers Union, Inc., and Farmers Direct, Inc. for leave to file an amicus curiae brief has been considered by the Court and is granted.

September 26, 2003

South Dakota Constitution, Article XVII, Sections 21 through 24.

§ 21. Corporate or syndicate farming prohibited -- Definitions -- Restrictions. No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming. The term, corporation, means any corporation organized under the laws of any state of the United States or any country. The term, syndicate, includes any limited partnership, limited liability partnership, business trust, or limited liability company organized under the laws of any state of the United States or any country. A syndicate does not include general partnerships, except general partnerships in which nonfamily farm syndicates or nonfamily farm corporations are partners. The term, farming, means the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products.

§ 22. Restrictions -- Application. The restrictions in § 21 of this Article do not apply to:

(1) A family farm corporation or syndicate. A family farm corporation or syndicate is a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another within the fourth degree of kinship according to civil

law, or their spouses. At least one of the family members in a family farm corporation or syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration. None of the corporation's or syndicate's partners, members, or stockholders may be nonresident aliens, or other corporations or syndicates, unless all of the stockholders, members, or partners of such entities are persons related within the fourth degree of kinship to the majority of partners, members, or stockholders in the family farm corporation or syndicate;

(2) Agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock;

(3) Nonprofit corporations organized under state nonprofit corporation law;

(4) Agricultural land, which, as of the approval date of this amendment, is being farmed, or which is owned or leased, or in which there is a legal or beneficial interest, directly or indirectly owned, acquired, or obtained by a corporation or syndicate, if such land or other interest

is held in continuous ownership or under continuous lease by the same such corporation or syndicate. For the purposes of this exemption, land purchased on a contract signed as of the approval date of this amendment is considered as owned on that date;

(5) Livestock, which as of the approval date of this amendment, is owned by a corporation or syndicate. For the purposes of this exemption, livestock to be produced under contract for a corporation or syndicate are considered as owned, if the contract is for the keeping or feeding of livestock and is signed as of the approval date of this amendment, and if the contract remains in effect and is not terminated by either party to the contract. This exemption does not extend beyond the term of any contract signed as of the approval date of this amendment;

(6) A farm operated for research or experimental purposes, if any commercial sales from the farm are only incidental to the research or experimental objectives of the corporation or syndicate;

(7) Land leases by alfalfa processors for the production of alfalfa;

(8) Agricultural land operated for the purpose of growing seed, nursery plants, or sod;

(9) Mineral rights on agricultural land;

(10) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential nonfarming purposes, for a period of five years from the date of purchase. A corporation or syndicate may hold

such agricultural land in such acreage as may be necessary to its nonfarm business operation, but pending the development of the agricultural land for nonfarm purposes, such land may not be used for farming except under lease to a family farm corporation or family farm syndicate or a non syndicate or noncorporate farm;

(11) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and may not be used for farming before being disposed of, except under a lease to a family farm corporation or syndicate, or a nonsyndicate or noncorporate farm. Any livestock so acquired shall be disposed of within six months;

(12) Agricultural lands held by a state or nationally chartered bank as trustee for a person, corporation or syndicate that is otherwise exempt from the provisions of § § 21 to 24, inclusive, of Article XVII;

(13) A bona fide encumbrance taken for purposes of security;

(14) Custom spraying, fertilizing, or harvesting;

(15) Livestock futures contracts, livestock purchased for slaughter within two weeks of the purchase date, or livestock purchased and resold within two weeks.

§ 23. Loss of qualification -- Requalification or dissolution. If a family farm corporation or family farm syndicate that has qualified under all the requirements of a family farm corporation or a family farm syndicate ceases to meet the defined criteria, it has twenty years, if the ownership of the majority of the stock of such corporation, or the majority of the ownership interest of such syndicate, continues to be held by persons related to one another within the fourth degree of kinship or their spouses, and their land holdings are not increased, to either requalify as a family farm corporation or family farm syndicate or dissolve and return to personal ownership.

§ 24. Annual report -- Violations -- Action and enforcement. Any corporation or syndicate that owns agricultural land or engages in farming is required to report information necessary for the enforcement of § § 21 to 24, inclusive, of Article XVII to the secretary of state on an annual basis, under rules promulgated by the secretary pursuant to state law. The secretary of state shall monitor such reports and notify the attorney general of any possible violations, and any resident of the state may also notify the attorney general of any possible violations. If a corporation or syndicate violates any provision of § § 21 to 24, inclusive, of Article XVII, the attorney general shall commence an action in circuit court to enjoin any pending illegal purchase of land or livestock, or to force divestiture of land or livestock held in violation of § § 21 to 24, inclusive, of Article XVII. The court shall order any land held in violation of § § 21 to 24 of Article XVII to be divested within two years and any livestock to be divested within six months. If land so ordered by the court has not been divested within two years, the court

shall declare the land escheated to the state. If the attorney general fails to bring an action in circuit court to enforce § § 21 to 24, inclusive, of Article XVII, any resident of the state has standing in circuit court to sue for enforcement.

(3) (4)

Nos. 03-1111 and 03-1108

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

CHRIS NELSON,
SOUTH DAKOTA SECRETARY OF STATE, *et al.*,
Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,
Respondents.

-and-

DAKOTA RURAL ACTION,
SOUTH DAKOTA RESOURCES COALITION,
Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Should this Court grant certiorari to petitioners to review the unanimous Court of Appeals decision that South Dakota's ban on so-called "corporate farming" impermissibly discriminated against interstate commerce in violation of this Court's dormant Commerce Clause doctrine?

CORPORATE DISCLOSURE STATEMENT

Montana-Dakota Utilities Co. is a division of MDU Resources, Inc. Northwestern Public Service is a division of Northwestern Corporation. On 9 April 2002, Otter Tail Power Company changed its corporate name to Otter Tail Corporation. No publicly traded company owns 10% or more of the stock of any of these entities. The other corporate entities for Respondents are privately held corporations.

TABLE OF CONTENTS

	Page
Counterstatement of the Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	vi
Statement of Case	1
A. South Dakota's Regulation Of Interstate Commerce: "Amendment E".	1
B. Factual Background.	2
1. General History of Amendment E.	2
2. The Legislative History of Amendment E.	3
3. The Adverse Impact of Amendment E on Interstate Commerce.	6
C. Procedural History	8

Contents

	Page
Reasons for Denying the Petition	10
Arguments	10
I. This Case Does Not Present An Issue To Which The Lower Courts Are In Conflict.	10
A. This Eighth Circuit's Ruling Does Not Conflict With Any Of This Court's Decisions.	10
1. The *Exxon Corp.* Decision.	11
2. The Eighth Circuit's Ruling Is Distinguishable From *Exxon Corp.*	12
B. Petitioners' "Discriminatory Purpose" Argument Is Flawed.	13
C. Petitioners' Argument That Some Evidence of Discriminatory Purpose Was Improper Should Be Rejected.	14
D. Conclusion.	16
II. The Petitions Do Not Present An Issue Of National Constitutional Importance.	16
A. No Other State Law Is Actually "Similar" To The South Dakota Law.	16

Contents

Page

1. Petitioners Exaggerate The Scope Of These Laws. 16

2. The Eighth Circuit's Ruling Lacks National Importance Because of Its Narrow, Fact-Specific Grounds. . . 18

3. Conclusion. 19

C. Petitioners "Immunity For Initiated Measures" Argument Is Flawed. 19

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Case Authorities:

Allegheny Corp. v. Richardson, Inc., 463 N.W.2d 678 (S.D. 1990) 2

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 15

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 13

Baldwin v. Seelig, 294 U.S. 511 (1936) 13

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 15

Cooper v. Aaron, 358 U.S. 1 (1958) 20

Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) 15

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 10-11, 12

Hoogestraat v. Barnett, 583 N.W. 2d 421 (S.D. 1998) 5

Hunt v. Wash. Apple Advertising Comm'n, 432 U.S. 333 (1977) 13

Cited Authorities

	Page
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)	15
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)	12
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Romer v. Evans, 517 U.S. 620 (1996)	17, 20
Constitutional References:	
Neb. Const. Art. XII, § 8	16
S.D. Const. Art. XVII, §§ 21-24	1
Statutory References:	
Iowa Code Ann. § 9H.1 *et seq.* (2001)	16, 17
Kan. Stat. Ann. § 17-5904 (Supp. 2002)	16
Minn. Stat. Ann. § 500.24 (West 2002)	16
Mo. Rev. Stat. 350.02 (Vernon 2001)	16
N.D. Cent. Code §§ 10-05.1-01 *et seq.* (2001)	16
Okla. Stat. Ann. Tit. 18 § 951 (Supp. 2004)	16

Cited Authorities

	Page
SDCL § 47-9A-1 *et seq.* (2003)	2
SDCL § 47-9A-13	2
SDCL § 47-9A-13.1	2
SDCL § 47-9A-14	2
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Miscellaneous References:	
Erwin Chemerinsky, *Constitutional Law* (2d ed. 2002)	13
John E. Nowak and Ronald D. Rotunda, *Constitutional Law* (6th ed. 2000)	13
Op. of Neb. A.G., No. 229 (1984)	18
Laurence H. Tribe, *American Constitutional Law* (3d ed. 2000)	12

Petitioners request that this Court grant certiorari to review an unremarkable decision of the Court of Appeals for the Eighth Circuit. *See* State Petitioners' Appendix at 1-27 (hereinafter referenced as "St. App. at __"). That unanimous panel decision held that a South Dakota law that prohibited certain common business practices in the livestock production industry and the electric utility power industries discriminated against interstate commerce in violation of this Court's dormant Commerce Clause doctrine. The petitions should be denied because the questions involved in this case are controlled by the previous decisions of this Court. Moreover, there is no conflict among the lower courts regarding the routine and doctrinally ordinary issues presented herein.

STATEMENT OF CASE

A. South Dakota's Regulation Of Interstate Commerce: "Amendment E".

The state regulatory scheme at issue in this case is a provision of the South Dakota State Constitution, Art. XVII, §§ 21-24. *See* St. App. at 90-94. It was adopted in 1998. Because of its placement on the ballot in 1998, it has been called "Amendment E". (Respondents will use hereinafter this terminology.) Amendment E is a detailed, intricate and comprehensive regulatory scheme that restricts the use of "corporate" or limited liability business structures by business entities involved in farming or ranching. St. App. at 90-94.

B. Factual Background.

1. General History of Amendment E.

As a matter of history, South Dakota's regulation of the involvement of corporations in agriculture began, for present purposes, with the Legislative passage of the Family Farm Act of 1974 (the "Act"). SDCL §§ 47-9A-1, *et seq*. Under the Act, corporate ownership or leasing of "agricultural land" was generally restricted.[1] The Act did not apply, however, to the livestock production industry.

The Act provided, for domestic corporations, two basic exemptions from the general prohibition of corporate format. The first was the "family farm corporation", SDCL § 47-9A-14. The second exemption was the provision for an "authorized farm corporation". *See id.* at 15. For present purposes, the authorized farm corporation might be understood as an exemption for certain small, closely-held corporations, defined largely in terms of federal income tax law.

The Act was tightened in 1988. It was amended to prohibit all corporations except family farm corporations from owning or operating a "hog confinement facility". *See* SDCL § 47-9A-13.1. Subsequent to 1988, it appeared that corporations could own the hogs that were raised or finished by South Dakota farmers. It was in response to this "contract farming" practice that the proponents of

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1. The Act explicitly prohibited foreign corporations from any ownership of land. *See* SDCL §§ 47-9A-13 and 14; *Allegheny Corp. v. Richardson, Inc.*, 463 N.W.2d 678, 679 (S. D. 1990). This indicates that State law historically favored domestic corporations and discriminated against out-of-state corporations.

Amendment E (led by Petitioners Dakota Rural Action and South Dakota Resources Coalition) started the Initiative process that culminated in Amendment E.

Although South Dakota appeared to have established a comprehensive regulatory scheme under the Act, the State hardened its position by adopting Amendment E. St. App. at 5. Amendment E is qualitatively more restrictive and more burdensome regarding interstate commerce in the livestock production and electric power industries.

The constitutionally significant differences between the Act and Amendment E are: (1) although the Act only applied to land ownership, Amendment E applied to the ownership of livestock; (2) although both the Act and Amendment E had exceptions for so-called "family farm" operations, the family farm exception under Section 22(1) of Amendment E was much narrower; (3) the Act had a second exception (for "authorized farm corporations") but Amendment E does not have this type of exception; (4) Amendment E was enacted as an amendment to the South Dakota Constitution thereby restricting any opportunities for its opponents, including Respondents, to use the normal legislative processes to correct any mistakes created by Amendment E; and (5) Amendment E's enforcement procedures (*e.g.*, "citizen standing") were much broader and potentially intrusive than the enforcement provisions of the Act, which relied on the Attorney General's office and the Secretary of State's office.

2. The Legislative History of Amendment E.

Both the sequence of events leading to the development of Amendment E and its legislative history are significant to understanding the soundness of the Eighth Circuit's

unanimous decision. *See* St. App. at 18-24. Although the Act prohibited most corporate involvement in agriculture, certain groups (including petitioners Dakota Rural Action ("DRA") and South Dakota Resources Coalition ("SDRC")) sought to impose even more restrictive regulations. Starting in March 1997, these sponsors held a set of meetings called "Hog Meetings". St. App. at 20. These meetings featured politicians and other activists generally strategizing against hog farming facilities (hence—the name "Hog Meetings"). Because of South Dakota's initiative laws, the sponsors had to act quickly in order to qualify any proposed amendment for the November 1998 ballot. In fact, the sponsors completed all deliberation and all drafting in less than eight weeks. As the lower courts recognized, this time pressure lead to haste in drafting, other procedural irregularities, *see* St. App. at 36, and nullified any chance that the proponents actually studied the potential effects of Amendment E. *See* St. App. at 22-23.

During this hasty drafting process, the sponsors were "warned" several times about the dormant Commerce Clause issues created by such a broad regulatory measure as Amendment E. For example, at the very first drafting meeting, the only lawyer on the five-person committee warned that the proposed amendment faced "Commerce Clause" problems; the lawyer was ignored. Trial Ex. 36. Shortly after this initial warning, the drafting committee was warned again—this time by a distinguished agricultural economist who the Eighth Circuit called an "expert"—that Amendment E would be vulnerable because it established such "complete" barriers to capital flow. St. App. at 21. Despite these warnings, the drafters, according to the Eighth Circuit, "charged forward without hesitation". *Id* at 22.

During the Initiative election campaign, several additional events occurred that demonstrated the protectionist purpose of the sponsors of Amendment E. First, the Initiative process provided the sponsors with a chance to promote Amendment E. The sponsors of Amendment E prepared a document called the "Pro Statement" which is disseminated to the voters. As the Eighth Circuit concluded, the Pro Statement was "brimming with protectionist rhetoric". *See* St. App. at 18-19. One example of the protectionist rhetoric was the statement that, unless Amendment E would pass, "[d]esperately needed profits will be skimmed out of the local economies and into the pockets of distant corporations". *Id.* at 19. Moreover, the sponsors further claimed in the Pro Statement that "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations". *Id.* In sum, the sponsors "sold" Amendment to the voters based on economic favoritism for "local economies" and hostility to "distant corporations". *See id.*

Second, in the Official Ballot Statement, South Dakota's Attorney General Mark Barnett (who was originally a defendant here) stated to all voters: "Amendment E could result in successful lawsuits against the State of South Dakota, under the U.S. Constitution". *See Hoogestraat v. Barnett*, 583 N.W.2d 421, 422 (S.D. 1998). On state law grounds, the South Dakota Supreme Court removed the sentence but not before it had state-wide publicity.

In addition to these "official" documents, the Eighth Circuit carefully reviewed other evidence of discriminatory purpose produced by Respondents at trial, mainly from cross-examination of Petitioners' witnesses. *See id.* at 20-22.

One of the most glaring pieces of testimony was the admission by the State's expert witness that Amendment E was a "South Dakota Law designed to restrict operation of global agribusiness firms". Trial Tr. at 505. The Eighth Circuit focused, moreover, on the testimony of one of the drafters of the Pro Statement that the purpose of Amendment E was to avoid "the Murphy hog farm unit [in North Carolina] and what its [sic] done to the environment". *See* St. App. at 20.

Other trial testimony, from drafters and other sponsors, established the transparency of the protectionism underlying Amendment E.[2] As the Eighth Circuit concluded: "It is clear that those individuals had a discriminatory purpose". *Id.* at 23.

3. The Adverse Impact of Amendment E on Interstate Commerce.

The adoption of Amendment E has created many economic problems for Respondents and other farmers and ranchers. At trial, the Respondents demonstrated the constitutionally pernicious consequences of Amendment E. Amendment E, for example, has severely limited the "value-added" process of "custom feeding livestock". Under Amendment E, feedlots cannot finish investor-owned livestock if the investor has a corporate format; Amendment E, therefore, interferes with

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2. Even the District Court had concluded that "There was some evidence at trial that Amendment E was motivated by discriminatory purposes." St. App. at 80. Indeed, when one reads the whole transcript, it is Respondents' contention that the testimony of the sponsors (including the drafters and their lawyer) presents a collective impression that the sponsors were proud of their economic protectionism and even defiant regarding the "warnings" (based on federal constitutional law) which they had received.

the interstate flow of investment capital. Amendment E has restricted all forms of "contract livestock production". From the testimony of State officials, the District Court learned that investment in farming and ranching, especially by non-residents, has been suppressed and distorted, with the burden on interstate commerce running into the millions of dollars.

The Utility Respondents, obviously participants in interstate commerce, demonstrated at trial how Amendment E had adversely impacted interstate commerce in several ways. First, the Utility Respondents are each interstate transmission utilities. Transmission corridors utilized by these transmission companies are typically owned by utilities in the form of transmission easements. The proscriptions of Amendment E apply to ". . . an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state. . . ." St. App. at 90. The District Court made a finding of fact that Amendment E cuts off the Utility Respondents from their traditional easements and increases their costs. *Id.* at 86.

Another significant burden on interstate commerce created by Amendment E relates to the wind power aspect of the Utility Respondents' business. *Id.* at 87. Amendment E blocks the development of transmission corridors for electric power generated by wind farms. South Dakota is a "prime location" for potential output of electrical energy generated by wind power; if South Dakota does not carry its share of wind power, it will place a greater burden on interstate commerce to develop wind power in other states. *Id.* at 86.

In sum, the effects of Amendment E on interstate commerce have been substantial and far-reaching. As the District Court recognized in its findings of fact, Amendment E has placed enormous added costs on Respondents, and others,

doing business in interstate commerce. St. App. at 86. Amendment E has suppressed interstate investment in the livestock industry, especially production contract farming and custom-finishing of livestock. Amendment E has prohibited the flow of interstate investment, particularly in the livestock industry and in the electric power production industry. In an interlocking multitude of ways, Amendment E has suppressed and impermissibly distorted interstate commerce.

C. Procedural History

Shortly after Amendment E was adopted, the Respondents began their investigation of the effects of Amendment E on the livestock and electric power industries and their planning of an appropriate legal action. The Respondents filed their claims in federal district court for the District of South Dakota. The Respondents from the livestock industry were joined by the Utility Respondents from the electric power generation and transmission industries.

Following discovery, the District Court denied various motions for summary judgment brought both by the State Petitioners and by the Intervenor Petitioners. The District Court (the Honorable Charles Kornmann) held a five-day bench trial in December, 2001. Respondents pursued their dormant Commerce Clause theories. The Respondents argued, and presented evidence, that Amendment E was a "discriminatory" state regulatory scheme. Respondents argued that Amendment E was discriminatory, under three theories: discriminatory purpose, facial discrimination and discriminatory effect. Respondents also argued, alternatively, that Amendment E "unduly burdened" interstate commerce.

The District Court eventually ruled for the Respondents on several grounds, including the dormant Commerce Clause claim. St. App. at 87. The District Court relied on the second tier of the dormant Commerce Clause doctrine, holding that Amendment E imposed an undue burden on interstate commerce. *See* St. App. at 85-86.

Both Petitioners appealed to the court of appeals for the Eighth Circuit. On appeal, the Respondents contended, as below, that Amendment E was both a discriminatory state regulatory scheme and, alternatively, one that unduly burdened interstate commerce. *See* St. App. at 26-27. Respondents contended that Amendment E was discriminatory under all three theories. St. App. at 18. Following briefing and oral argument, the Eighth Circuit panel unanimously affirmed the District Court but on different grounds. The Eighth Circuit held that the Amendment E regulatory scheme was discriminatory and that the state Petitioners did not satisfy their burden of persuasion. St. App. at 26-27. The Eighth Circuit carefully indicated that, because it found overwhelming evidence of a discriminatory purpose underlying Amendment E, "we do not consider the other two tests [for discrimination], or the second tier analysis, the *Pike* balancing test." St. App. at 18. The Eighth Circuit concluded that it had found the evidence of discriminatory purpose in the record sufficient to place the case in the discrimination tier of the dormant Commerce Clause doctrine.

The Intervenor Petitioners sought rehearing and rehearing *en banc*. The State Petitioners did not join, but also did not disclaim, the rehearing petition. The rehearing petition was eventually denied. St. App. at 3. Subsequently, both Petitioners timely filed separate petitions for a writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

This is an unremarkable case. The decision by the Court of Appeals was a straight-forward, almost routine application of this Court's dormant Commerce Clause jurisprudence. The Eighth Circuit's decision does not conflict in any way with this Court's decisions or any other circuit's decisions concerning the dormant commerce Clause doctrine. Moreover, since the South Dakota law at issue is unusual (and certainly the most extreme of any such laws), this case does not represent a constitutional issue of significant public importance.

As discussed below, this case is merely an old-fashioned dormant Commerce Clause case. The Eighth Circuit's ruling was proper in all respects, and Respondents respectfully urge this Honorable Court to deny the Petitions for Writ of Certiorari.

ARGUMENTS

I. This Case Does Not Present An Issue To Which The Lower Courts Are In Conflict.

In an attempt to secure this Court's attention, Petitioners claim that the Eighth Circuit's decision conflicts with this Court's decisions or with certain lower court decisions. Upon examination, however, these claims are simply not sustainable.

A. This Eighth Circuit's Ruling Does Not Conflict With Any Of This Court's Decisions.

The Petitioners place primary reliance on an alleged conflict with this Court's decision in *Exxon Corporation v.*

Governor of Maryland, 437 U.S. 117 (1978). *See* State Pet. at 12; Intervenor Pet. at 11. When the holding in *Exxon Corp.* is properly described, however, it is apparent that the Eighth Circuit decision does not in any way conflict with *Exxon Corp.* decision.

1. The *Exxon Corp.* Decision.

In *Exxon Corp.*, the state of Maryland enacted a statute requiring producers and refiners of petroleum products to divest any retail gasoline stations in Maryland. 437 U.S. at 125. The divestiture statute was challenged under several constitutional theories, including dormant Commerce Clause doctrine. *See id.* at 122. At the time the statute was passed, there were no producers or refiners in Maryland, and the burden of divestiture fell, therefore, solely on out-of-state companies. This Court concluded only a "small" percentage of the retail gasoline stations would be impacted. *Id.* at 123.

Petitioners' argument is flawed because they rely only on certain dictum in *Exxon Corp.* Such reliance is inadequate to support the petitions. The *Exxon Corp.* decision rested on the unique facts that there were no local producers or refiners and, hence, no local entities could have been "favored". *See id.* at 125 Moreover, the *Exxon Corp.* Court concluded that the record in this case showed "no demonstrable effect whatsoever on the interstate flow of goods". *Id.* at 126 n.16. Because there was no burden on interstate commerce and no evidence of protectionism, this Court in *Exxon Corp.* decided that the Maryland statute was not discriminatory. *Id.* at 125.

The Petitioners also argue that the *Exxon Corp.* "principle" has been "reaffirmed". Actually, any principle derived from *Exxon Corp.* has been narrowed over time,

particularly in this Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 40-41 (1980). In *Lewis*, just two years after *Exxon Corp.*, this Court confirmed that the *Exxon Corp.* decision depended on the absence of any showing that interstate commerce was burdened. *Lewis*, 447 U.S. at 42. *See* Laurence H. Tribe, *American Constitutional Law* 1059 n.1 (3d ed. 2000) (*Exxon Corp.* decision depended upon "no evidence" of discrimination).

2. The Eighth Circuit's Ruling Is Distinguishable From *Exxon Corp.*

When the *Exxon Corp.* decision is properly understood, this case is easily distinguishable. First, the Respondents in this case made a strong showing that Amendment E had a discriminatory effect on interstate commerce. The Eighth Circuit indicated that it did not have to reach to this evidence because other evidence in the record (regarding purposeful discrimination) was so overwhelming. St. App. at 18. Thus, contrary to *Exxon Corp.* where there was "no evidence" of impermissible effect, this record demonstrated discriminatory effects—both exclusionary (tariff) and favoritism (protectionism).

Second, this case is also distinguishable because the Respondents demonstrated that Amendment E was facially discriminatory. In *Exxon Corp.*, this Court concluded that the Maryland statute was not facially discriminatory. *See Lewis*, 447 U.S. at 41-43. Thus, because the Eighth Circuit could have rested on a facial discrimination approach, the Eighth Circuit's decision is distinguishable from *Exxon Corp.*

In sum, since *Exxon Corp.* is distinguishable, there is no conflict with this decision and no basis for the Petitions.

B. Petitioners' "Discriminatory Purpose" Argument Is Flawed.

Petitioners also argue that a discriminatory purpose alone is insufficient for a court to find that a state regulatory scheme is "discriminatory". Petitioners then assert, as a minor premise of their argument, that the Eighth Circuit's decision was based "solely" on a determination of discriminatory purpose. *See* St. App. at 11. Therefore, Petitioners argue that the petition should be granted because the Eighth Circuit's decision is inconsistent with this Court's doctrine.

First, the major premise of Petitioners' argument is not supported or supportable. It is hornbook law that *discrimination* can be demonstrated any one of three ways: (1) facial discrimination; (2) discriminatory purpose; or (3) discriminatory effect. *See, e.g., Hunt v. Wash. Apple Advertising Comm'n*, 432 U.S. 333, 352 (1977); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); Erwin Chemerinsky, *Constitutional Law* 417 (2d ed. 2002); John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 661-662 (6th ed. 2000). Petitioners' mistaken argument that discrimination cannot be shown by discriminatory purpose alone is directly refuted by the *Bacchus Imports* decision. There, this Court stated:

> Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach [*i.e.*, the undue burden standard] . . .

Id., 468 U.S. at 270. *See also Hunt*, 432 U.S. at 352 (implying that purpose alone would be sufficient); *Baldwin v. Seelig*, 294 U.S. 511, 527 (1936) (the regulations were "hostile in

conception"). The major premise of Petitioners' argument, therefore, is fatally flawed.

That is not, moreover, the only weakness in Petitioners' argument. The minor premise cannot be sustained. In this case, the Eighth Circuit did not reject Respondents' theories of facial discrimination and discrimination in effect. The Eighth Circuit simply concluded that, since the evidence of discriminatory purpose was so overwhelming, it did not have to *reach* any other theory of discrimination or undue burden:

> . . . but we rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests, or the second tier analysis, the *Pike* balancing test.

St. App. at 28. Thus, the minor premise of Petitioners' argument is also flawed. This argument does not present any basis for further review.

C. Petitioners' Argument That Some Evidence of Discriminatory Purpose Was Improper Should Be Rejected.

One of Petitioners' arguments appears to be that it was improper for the Eighth Circuit to consider sworn testimony from the drafters of Amendment E or other sponsors of the Amendment E initiative process in determining that an impermissible discriminatory purpose was underlying the enactment of the regulatory scheme. This argument flies in the face of this Court's well-settled doctrine.

Respondents' submitted at trial the testimony of the relevant decisionmakers (including the members of the drafting committee) and other Initiative sponsors under the authority of this Court's decisions in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) and *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 677 (1981) (consideration of a state Governor's "veto message" as part of the determination of discriminatory purpose). Since it was properly admitted at the trial, there was nothing improper about the Eighth Circuit's reliance on such evidence. As this Court stated just last Term: "Again, statements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative". *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003).

Amendment E was "ultimately enacted" to the detriment of interstate commerce. Some of the evidence of discriminatory purpose came from statements by the "sponsors" of Amendment E. Under this Court's ruling in *Cuyahoga Falls*, there was nothing improper about this evidence.[3] This Court should reject this argument and deny the Petitions.

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3. Respondents would note that even Petitioners do not claim that the testimony of the sponsors was the only evidence on the issue of discriminatory purpose. Respondents submitted evidence on all six factors in *Arlington Heights*. *See* 429 U.S. at 268. In particular, Respondents relied on the sequence of events, legislative history and unrebutted evidence of discriminatory effect in addition to the evidence provided by the testimony of the sponsors. This is simply not a case of discriminatory purpose proven *only* by decisionmaker testimony.

D. Conclusion.

Under the circumstances, none of Petitioners' arguments asserting "inconsistency" are sustainable. No further review by this Court would be necessary. This Court should deny the Petitions.

II. The Petitions Do Not Present An Issue Of National Constitutional Importance.

The Petitioners also argue that this case presents "important" national questions. *See, e.g.*, St. Pet. at 21. However, when the extreme nature of South Dakota's peculiar law is recognized and the narrowness of the Eighth Circuit's decision is understood, the Petitions present unremarkable questions not worthy of further review.

A. No Other State Law Is Actually "Similar" To The South Dakota Law.

Both Petitioners claim that eight other states have "similar" laws to South Dakota's Amendment E.[4] This claim is, in fact, an exaggeration and, for the following reasons, should not be credited.

1. Petitioners Exaggerate The Scope Of These Laws.

Although eight States besides South Dakota have so-called anti-corporate laws, some of these State laws do not

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4. In alphabetical order, the eight other state laws are: Iowa Code §§ 9H.1 to 9H.15; Kan. Stat. Ann. §§ 17-5902 to 17.5904; Minn. Stat. § 500.24; Mo. Rev. Stat. § 350.015; Neb. Const. Art. XII, § 8; N.D. Cent. Code §§ 10-06.1-01 to 10.06.1-27; Okla. Stat. Ann. Tit. 18 § 951; and Wis. Stat § 182.001.

generally cover the livestock industry.[5] Two states only regulate regarding the ownership of land: Kansas and Oklahoma. There are, in fact, only six State laws which purport to regulate the livestock industry as part of regulating farming or ranching.

Petitioners also exaggerate the alleged importance of this case when they omit to inform this Court that, even of the six States which generally regulate the involvement of corporations in the livestock industry, only two States (South Dakota and Nebraska) regulate through the draconian means of a State Constitutional provision. Placement of such a broad regulatory scheme in the State Constitution undercuts the normal legislative and political processes. In these two States, the normal processes—which lead to deliberation, study and compromise—have been cut off. *Cf. Romer v. Evans*, 517 U.S. 620, 631 (1996) (burdened parties can obtain protection "only by enlisting the citizenry of Colorado to amend the State Constitution . . ."); *Reitman v. Mulkey*, 387 U.S. 369, 377 (1967) (placement of state scheme in state constitution meant that it was now "embedded in the State's basic charter, immune from legislative or judicial regulation at any level of the state government."). This is an unusual burden placed on Respondents and, of course, interstate commerce. Under these circumstances, South Dakota's law is not actually "similar" in regulatory scope to the laws of any of the other States except, arguably, Nebraska.

Even regarding Nebraska, however, the Petitioners' "similarity" argument is an exaggeration. There is an important distinction between the South Dakota and

5. The state of Iowa does not generally regulate the corporate ownership of livestock; Iowa bans "any processor of beef or pork" from owning certain livestock. *See* Iowa Code § 9 H.2.

Nebraska laws as they affect the livestock industry. The Nebraska law only regulates the "front end" of the livestock industry. In Nebraska, feedlots and custom feeding operations (such as in the businesses of several Respondents) are not covered. *See*, *e.g.*, Opinion No. 229, 1984 Opinions of Neb. A.G., 1 (1984), 1984 W.L. 162900. In this case, South Dakota's law regulates the livestock industry from semen to slaughter—and is the broadest such scheme in the Nation. *See* St. App. at 93.

In sum, South Dakota's Amendment E regulates the livestock industry—not just land ownership. It regulates through a state constitutional mechanism—not the normal legislative process. South Dakota's Amendment E was intended as, and is, the broadest anti-corporate farming law in the Nation.

This case is not nationally important because South Dakota's law is uniquely broad and burdensome. The fate of Amendment E, therefore, has little implication, if any, for potential challenges to other state laws.

2. The Eighth Circuit's Ruling Lacks National Importance Because of Its Narrow, Fact-Specific Grounds.

This case is also not nationally important because of the way in which the Eighth Circuit analyzed the case. Although the Eighth Circuit could have struck down Amendment E on several grounds (*e.g.*, facial discrimination, discrimination in effect or as an undue burden on interstate commerce), the Court of Appeals used the narrowest possible grounds to find discrimination. Instead of plowing new doctrinal ground, the Eighth Circuit used a fact-specific, "discriminatory purpose"

analysis. The Eighth Circuit carefully scrutinized the Record to find the panoply of facts demonstrating the discriminatory purposes underlying the adoption of Amendment E. St. App. at 18-24.

The Eighth Circuit could have relied on facial discrimination or discriminatory effect. Instead it used a narrow (*i.e.*, more fact-specific) basis: the showing of discriminatory purpose. It is unlikely that any other state regulatory scheme would have a similarly overwhelming record of discriminatory purpose. The narrow grounds for the Eighth Circuit's decision, therefore, belie any of Petitioners' claims of national importance.[6]

3. Conclusion.

In sum, this case involves the broadest such state law struck down by the Eighth Circuit on the narrowest available grounds. Under these circumstances, the Eighth Circuit's analysis (while entirely proper) would be limited in its applicability to any other state law. Consequently, the Petitioner's claim of "national significance" should be recognized as an argumentative exaggeration, and this Court should deny these Petitions.

C. Petitioners "Immunity For Initiated Measures" Argument Is Flawed.

As one of their arguments, the State Petitioners claim that the Eighth Circuit's decision somehow violates the state's rights simply because the state's regulatory scheme was placed in its state constitution. This argument for national

6. The way the Eighth Circuit decided this case was a strength—not a weakness. Using the narrowest ground (when available) is a sound and common approach, consistent with an Article III court's role.

significance is fatally flawed. There is no constitutional immunity for state laws just because they are placed in the state's constitution through the initiative process. *See Reitman v. Mulkey*, *supra*, 387 U.S. at 381. In another recent example, this Court struck down a Colorado state constitutional amendment in *Romer v. Evans*, *supra*, 512 U.S. at 631. Moreover, although the State of Arkansas placed its disagreement with this Court's decisions in its constitution, the state's defiance was not immunized against the principles of the federal constitution. *See Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

Similarly here, just because the South Dakota's disagreement with the principles of this Court's dormant Commerce Clause doctrine was placed in its state constitution by the Initiative process does not immunize the petitioners' position. Under these circumstances, no further review by this Court is necessary, and this Court should deny the Petitions.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petitions.

Respectfully submitted,

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Nos. 03-1108 and 03-1111

In the
Supreme Court of the United States

DAKOTA RURAL ACTION, *et al.*,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,

Respondents.

CHRIS NELSON, SECRETARY OF STATE OF SOUTH DAKOTA, *et al.*,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* NATIONAL FARMERS UNION, SOUTH DAKOTA FARMERS UNION, NORTH DAKOTA FARMERS UNION, MINNESOTA FARMERS UNION, IOWA FARMERS UNION, CAMPAIGN FOR FAMILY FARMS, WESTERN ORGANIZATION OF RESOURCE COUNCILS, DAKOTA RESOURCE COUNCIL, NATIONAL FAMILY FARM COALITION, AND FRIENDS OF THE CONSTITUTION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, National Farmers Union, South Dakota Farmers Union, North Dakota Farmers Union, Minnesota Farmers Union, Iowa Farmers Union, Campaign For Family Farms, Western Organization of Resource Councils, Dakota Resource Council, National Family Farm Coalition, and Friends of the Constitution (collectively, "*Amici Curiae*") respectfully move for leave to file the accompanying brief as *Amici Curiae* in support of the Petitions for Writ of Certiorari filed by Petitioners the South Dakota Secretary of State, *et al.* and Dakota Rural Action, *et al.* Petitioners have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court. Counsel for Respondents have not consented to the filing of this *amici curiae* brief, necessitating this motion.

Amici Curiae represent 76 farmer-based organizations representing several hundred thousand members who have advocated for many years for the preservation and strengthening of the family farm system of agriculture and rural communities across the nation. *Amici Curiae* support granting the two petitions in this case. They write separately in order to emphasize the broad importance of this case by articulating the concerns of farmers and rural communities in a multitude of other states with similar laws restricting corporate participation in agriculture.

Amici Curiae are concerned about the potential ramifications if this case is left unreviewed by this Court. The Eighth Circuit Court of Appeals struck down South Dakota's constitutional amendment, known as Amendment E, restricting corporations from farming or having an interest in farmland. This decision threatens states' legitimate attempts to foster the family farm system of agriculture and puts rural communities at risk. The Eighth Circuit's decision would

leave vulnerable to dormant Commerce Clause challenge many other important state laws regulating corporate engagement in agriculture. *Amici Curiae* have worked to enact and protect state laws like Amendment E that support family farmers; they therefore have an interest in supporting the Petitions for Writ of Certiorari.

In light of the important issues being raised in this case, *Amici Curiae* respectfully request that their Motion for Leave to File Brief of *Amici Curiae* be granted.

Respectfully Submitted,

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TABLE OF CONTENTS

Pages

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW WEAKENS STATES' AND CITIZENS' EFFORTS TO PRESERVE THE FAMILY FARM SYSTEM NATIONWIDE 6

II. THE PETITIONS PRESENT IMPORTANT QUESTIONS REGARDING THE REACH OF THE DORMANT COMMERCE CLAUSE 12

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Asbury Hospital v. Cass County, 326 U.S. 207 (1945) 16

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 18, 19

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 13

CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987) 16

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 15

Hampton Feedlot v. Nixon, 249 F.3d 814 (8th Cir. 2001) 17

Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976) 15

Hughes v. Oklahoma, 441 U.S. 322 (1979) 13

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. (1977) 19

Livestock Mktg. Ass'n v. USDA, 335 F.3d 711 (8th Cir. 2003), *petitions for cert. filed,* (U.S. Feb.13, 2004) (Nos. 03-1164 and 03-1165) 4

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MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991) 17

Northern States Power Co. v. United States, 73 F.3d 764 (8th Cir. 1996) 14

Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994) 13

Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935) 17-18

Parker v. Brown, 317 U.S. 341 (1943) 17

Perry v. Commerce Loan Co., 383 U.S. 392 (1966) 14

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 13, 14

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State ex rel. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801 (Mo. 1988) 16-17

Waste Sys. Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1992) 19

Statutes

Iowa Code §§ 9H.1 *et seq.* 7

Kan. Stat. Ann. §§ 17-5902 *et seq.* 7

Minn. Stat. § 500.24 ..... 2, 7, 8

Mo. Rev. Stat. § 350.015 7

Neb. Const. Art. XII, § 8 7

N.D. Cent. Code §§ 10-06.1-01 *et seq.* 7, 8

Okla. Const. Art. XXII, § 2 7

S.D. Codified Laws §§ 47-9A-1 *et seq.* 8

S.D. Const. Art. XVII, §21 14

Wis. Stat. § 182.001 7

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici Curiae have an interest in this case because these 76 farmer-based organizations and their several hundred thousand members believe in preserving the family farm system of agriculture.

National Farmers Union (NFU), officially called the Farmers Educational and Cooperative Union of America, was founded in 1902. NFU is a general farm organization with a membership of nearly 250,000 farm and ranch families throughout the United States. NFU is a federation, with the presidents of the 23 state and one regional (covering three states) Farmers Union organizations serving as its board of directors. For more than 100 years, NFU's primary goal has been to sustain and strengthen family farm and ranch agriculture. NFU believes that a vibrant agricultural sector is the foundation for strong farm and ranch families and thriving rural communities, which are, in turn, vital to the health and economic well being of the entire U.S. economy.

South Dakota Farmers Union (SDFU) is a grassroots membership organization that serves the needs of rural South Dakota. SDFU has been the voice of the family farm in South Dakota for nearly a century, acting as the farmers' "hired hand" in the halls of state and federal government. SDFU's mission is to preserve the family farm, ranch, and rural communities. Building on a foundation of education, legislation, and cooperation, SDFU has provided guidance and support for farmers, small businesses, and rural communities throughout the state. SDFU is a member of National Farmers Union.

Founded in 1927, North Dakota Farmers Union

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

(NDFU) is a producer-controlled organization dedicated to serving its 37,000 North Dakota family members. NDFU is committed to providing effective grassroots leadership in rural America. NDFU believes that the family farm system of agriculture is the only way to ensure rural and urban stability, national prosperity, the preservation of human and natural resources, and the dignity of the individual and the family. NDFU is a member of National Farmers Union.

Minnesota Farmers Union (MFU) is a non-profit membership-based organization with approximately 23,400 members, about 95 percent of whom are Minnesota farmers. Founded in 1929, MFU works to protect and enhance the economic interests and quality of life of family farmers and ranchers in rural communities. MFU has lobbied at the Minnesota legislature to protect Minnesota's corporate farming law, Minn. Stat. § 500.24, which restricts non-family corporations from farming in Minnesota. This law is important to MFU's family farmer members who endeavor to sustain a strong economy and healthy environment in rural Minnesota. MFU is a member of National Farmers Union.

Iowa Farmers Union (IFU) is a non-profit advocacy group representing family farmers across the state of Iowa. IFU's mission is to promote a viable system of sustainable agriculture and a high quality of life in rural communities through education of farmers, rural residents, and urban consumers; cooperation among farmers; and community activism. IFU has worked to preserve Iowa's restrictions on corporate ownership of farmland and livestock by, among other things, joining with other farm organizations in submitting *amici curiae* briefs in support of Iowa's corporate farming law. *See Smithfield Foods, Inc. v. Miller,* 241 F. Supp. 2d 978 (S.D. Iowa. 2003), *appeal pending,* No. 03-1411 (8th Cir.). IFU is a member of National Farmers Union.

The Campaign for Family Farms (CFF) is an unincorporated association of family farm and community

membership organizations comprised of the Land Stewardship Project (Minnesota), Iowa Citizens for Community Improvement, Missouri Rural Crisis Center, Illinois Stewardship Alliance, and Citizens Action Coalition of Indiana. CFF and its member organizations work to foster an ethic of stewardship for farmland, promote sustainable agriculture, and develop sustainable communities. They seek to develop and implement farm policies, farming practices, and marketing systems that help family farms and rural communities thrive. CFF works for thousands of family farmers who raise livestock and crops and who believe family farming is an important element of the economies and environment of rural communities. CFF and its organizations believe anti-corporate farming laws, which prohibit non-family corporations from farming, are an important part of state policy supporting family farming and may be put in question by the ruling in this case. On behalf of independent hog farmers, CFF has brought a constitutional claim to end the mandatory pork checkoff program. *See Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed,* (U.S. Feb. 19, 2004) (No. 03-1180).

The Western Organization of Resource Councils (WORC) is a network of grassroots organizations from seven states that includes 8,250 members and 49 local community groups. WORC's seven state organizations are: the Dakota Resource Council (North Dakota), Dakota Rural Action[2] (South Dakota), the Idaho Rural Council, the Northern Plains Resource Council (Montana), Oregon Rural Action, the Powder River Basin Resource Council (Wyoming), and the Western Colorado Congress. WORC's mission is to advance the vision of a democratic, sustainable, and just society

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[2] Dakota Rural Action is a Petitioner in this case. Neither Dakota Rural Action nor its counsel authored in whole or in part this brief, and Dakota Rural Action did not make a monetary contribution to the preparation or submission of this brief.

through community action. WORC is committed to building environmentally and economically sustainable communities that balance economic growth with the health of people and stewardship of their land, water, and air resources. On behalf of independent cattle farmers and ranchers, WORC has brought a constitutional claim to end the mandatory beef checkoff program. *See Livestock Mktg. Ass'n v. USDA,* 335 F.3d 711 (8th Cir. 2003), *petitions for cert. filed,* (U.S. Feb. 13, 2004) (Nos. 03-1164 and 03-1165).

Dakota Resource Council (DRC) is a grassroots organization formed in 1978 to protect North Dakota's land, air, water, rural communities, and agricultural economy. DRC is working for preservation of family farms, enforcement of corporate farming laws, protection of groundwater and clean air, and renewable energy. DRC's mission is to form enduring, democratic local groups that empower people to influence decision-making processes that affect their lives.

Formed in 1986, the National Family Farm Coalition (NFFC) represents 30 grassroots farm and rural advocacy organizations in more than 27 states committed to preserving and enhancing a family farm food production system in the United States. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming.

Friends of the Constitution is a 19–member coalition of farm, church, and environmental groups concerned about corporate farming. The groups have joined together to defend and enforce Initiative 300, the Nebraska constitutional amendment banning non-family farm corporations, which was adopted by the citizens of Nebraska in 1982. Friends of the Constitution's member groups are: American Corn Growers Association; Citizens for Air, Resources and Environment (CARE); Center for Rural Affairs; Custer County Sustainable Agriculture Society; League of Rural Voters; Mid-Nebraska PRIDE; Nebraska Appleseed Center

for Law in the Public Interest; Nebraska Catholic Conference; Nebraska Chapter—Sierra Club; Nebraska Grange; Nebraska Lutheran Advocacy; Nebraska Farmers Organization; Nebraska Farmers Union, which is a member of National Farmers Union; Nebraska Wildlife Federation; Nebraska—Worth Fighting For; Northeast Nebraska Ag Support Group; Saunders County Livestock; Save Our Rural Resources (SORR); and Women Involved in Farm Economics (WIFE).

Amici Curiae have sought to enact and protect state laws that support family farmers and therefore have an interest in seeking that this Court grant the Petitions for Writ of Certiorari and reverse the Eighth Circuit's decision, which is incorrect as a matter of law and is inconsistent with Supreme Court precedent.

SUMMARY OF THE ARGUMENT

Rural America has seen significant changes over the past several decades. With the rise of concentration and vertical integration in agriculture, farming has become increasingly industrialized. While the number of farms has fallen dramatically, the size of farms has increased. In an attempt to address the adverse effects this trend has had on rural communities, states and citizens have enacted laws and constitutional amendments that, to varying levels, regulate or restrict corporations from owning farmland or engaging in farming. South Dakota's constitutional amendment, known as "Amendment E," was passed in 1998 by 59 percent of those voting in the referendum, and similarly addresses problems caused by corporate agriculture. In analyzing whether Amendment E violates the dormant Commerce Clause, the Eighth Circuit did not consider whether the text of the amendment discriminated against out-of-state interests, or whether it had a discriminatory effect, but rather viewed and weighed evidence of the intent of the proponents of the

amendment. Based only on evidence that the proponents' purpose in supporting Amendment E was to ensure that rural South Dakota did not suffer the same environmental, economic, and sociological problems as other states with concentrated industrial agriculture, the court reviewed Amendment E with strict scrutiny. The Eighth Circuit erred by applying a strict scrutiny standard based solely on evidence of discriminatory intent when the amendment did not discriminate on its face or in effect. This Court's dormant Commerce Clause decisions have not applied a strict scrutiny standard based on discriminatory intent alone.

Because Amendment E treats all corporations the same, whether based in or outside South Dakota, the Eighth Circuit should have balanced South Dakota's legitimate interest in choosing the type of agriculture it wishes to foster with any incidental burdens on interstate commerce. If the proper balancing test were applied, Amendment E would fall in line with a host of other state regulations that have been upheld as legitimate. The states' ability to regulate agriculture and ensure continued viability of rural communities will be jeopardized unless this Court grants the petitions of the South Dakota Secretary of State, *et al.*, and Dakota Rural Action, *et al.* and reverses the Eighth Circuit's erroneous decision.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW WEAKENS STATES' AND CITIZENS' EFFORTS TO PRESERVE THE FAMILY FARM SYSTEM NATIONWIDE

This Court should grant the two petitions in this case because leaving intact the decision below weakens states' and citizens' efforts to preserve the family farm in South Dakota and throughout the nation. By striking down South Dakota's constitutional amendment restricting corporations from farming or having an interest in farmland (with certain

exceptions), the Eighth Circuit's decision undermines the family farm to the detriment of rural communities.

For-profit corporations are creatures of state laws designed to allocate capital in what is deemed the most "efficient" manner without regard to communities, neighborhoods, and families. *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting) ("Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State."). In contrast, family farms, and the families that operate them, strive for different goals: building sustainable rural communities, promoting responsible stewardship of soil, water, and other resources, and ensuring through family ownership that land can be farmed by future generations. *See, e.g.,* Marty Strange, *Family Farming: A New Economic Vision* 32-42 (1988). *Amici Curiae* believe that allowing corporations to enter into farming in South Dakota, and potentially in other states, would undermine family farms and the rural communities that these organizations have advocated to preserve and strengthen. *See* Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N. Dak. L. Rev. 449, 494-95 (1999) (noting state anti-corporate farming laws enhance farmers' bargaining power).

If the Eighth Circuit's decision is not reversed, it could open the floodgates to challenges of state laws that restrict, to varying degrees, corporations from engaging in farming and owning agriculture land in eight other states. *See* Iowa Code §§ 9H.1 to 9H.15; Kan. Stat. Ann. §§ 17-5902 to 17.5904; Minn. Stat. § 500.24; Mo. Rev. Stat. § 350.015; Neb. Const. Art. XII, § 8; N.D. Cent. Code §§ 10-06.1-01 to 10.06.1-27; Okla. Const. Art. XXII, § 2; and Wis. Stat. § 182.001. These laws — or some version of them — have

been in place for decades, including North Dakota's anti-corporate farm statute, which was first enacted in 1932, and South Dakota's Family Farm Act of 1974. *See* S.D. Codified Laws §§ 47-9A-1 to 47-9A-23; N.D. Cent. Code §§ 10-06.1-01 to 10.06.1-27. These laws are necessary for a number of reasons, but the overarching reason—the protection of family farms—was succinctly articulated by the Minnesota legislature in the purpose section of that state's anti-corporate farming law:

> The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.

Minn. Stat. § 500.24, subd. 1.

The threat to family farming addressed by these laws may best be illustrated by considering the dramatic consequences of concentration and consolidation of corporate power in the hog industry over the past two decades. USDA statistics show the steady exit of independent hog farmers from the hog industry in the past 20 years. In the mid-1980s, there were approximately 500,000 hog farms in the nation; as of year-end 2002, the number had shrunk to 75,350 hog operations. USDA National Agricultural Statistics Service Quarterly, *Hogs and Pigs Report* (Dec. 30, 2002), *available at* http://jan.mannlib.cornell.edu/reports/nassr/livestock/phpbb/2002/hgpg1202.txt. Large corporate interests are replacing independent family hog farms. While the number of hog farms has declined, the total number of hogs produced has remained relatively stable, resulting in increasingly large hog operations. William D. McBride & Nigel Key, *Economic and Structural Relationships in U.S. Hog Production-*

Agricultural Economic Report No. 818, 5 (Feb. 2003), *available at* http://www.ers.usda.gov/publications/aer818/aer818.pdf. Those farmers who do raise hogs are increasingly raising them not as independent producers but on behalf of others, usually a packer or packer affiliate. A 2002 study shows that more than 83 percent of hogs were committed to packers before slaughter through packer ownership or contractual arrangements, up from 38 percent in 1994. University of Missouri and National Pork Board, *Hog Marketing Contract Study* (Jan. 2002), *available at* http://agebb.missouri.edu/mkt/vertstud.htm.

The shift toward vertical integration and corporate ownership of livestock has had devastating economic effects on independent family farmers and their rural communities. As packer ownership and control of hogs increases and the number of packers shrinks,[3] independent hog farmers find themselves without a competitive market in which to sell their hogs. Packers owning or controlling hogs have less need of an independent farmer's relatively small number of hogs. Independent hog farmers are unable to find buyers willing to pay a competitive price for their hogs, driving them out of business or into unfavorable contracts with packers.[4] *See, e.g.*, Neil E. Harl, *The Structural Transformation of Agriculture* 4-

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[3] In 2000, four firms controlled 56 percent of the nation's hog processing industry. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001*, 18, 38 (June 2002), *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf.

[4] At least one study has shown that prices paid to independent hog producers decrease as packers' control of production increases. That study found that at the "10 percent level of integration, the price paid to independents declines by six percent. At 50 percent integration, the price declines by about 26 percent." Azzadine M. Azzam & Allen C. Wellman, *Packer Integration into Hog Production: Current Status and Likely Impacts of Increased Vertical Control on Hog Prices and Quantities*, University of Nebraska Agriculture Research Bulletin 315-F (1992).

5 (March 20, 2003), *available at* http://www.econ.iastate .edu/faculty/harl/StructuralTransformationofAg.pdf.

This trend of losing family farms while the size of farms has expanded extends well beyond the hog industry. The number of farmers in the United States fell from 6.8 million in 1935 to less than 2 million in 1997, while the average farm size has more than doubled from 155 acres in 1935 to 487 acres in 1997. Robert A. Hoppe, *Structural and Financial Characteristics of U.S. Farms: 2001 Family Farm Report*, ERS Agriculture Information Bulletin No. 768, 6-7 (May 2001), *available at* http://www.ers.usda.gov/ publications/aib768/aib768.pdf. Following this trend, South Dakota lost 14 percent of its farms between 1980 and 2001. USDA, South Dakota Agric. Statistics Serv., *South Dakota Farms, Land in Farms, and Livestock Farms* (Feb. 22, 2002), *available at* http://www.nass.usda.gov/sd/releases /farm0202.pdf.

The loss of independent family farmers has a ripple effect on rural communities. Studies have consistently shown that independent family farms contribute significantly more to healthy rural communities than do corporate-owned farms. As early as the 1940s, at the direction of the U.S. Senate, anthropologist Dr. Walter Goldschmidt compared two rural California communities in which the structure and size of farms were different, but the total value of farm production was almost identical. Walter Goldschmidt, *Small Business and the Community: A Study in the Central Valley of California on Effects of Scale of Farm Operations*, reprinted by Senate Special Committee to Study Problems of American Small Business, 79th Cong., 2d Sess., Report of the Special Committee 13 (Comm. Print. 1946). Goldschmidt concluded from his research that residents of the community with larger, industrialized farms realized a lower standard of living and quality of life compared to the residents of the community with smaller farms. *Id.*

A recent study comparing agriculture-dependent counties in states with anti-corporate farming laws, such as South Dakota, to those without such laws, found that agriculture-dependent counties in states with anti-corporate farm laws had fewer families in poverty, lower unemployment, and a higher percentage of farms realizing cash gains. Dr. Rick Welsh & Dr. Thomas A. Lyson, *Anti-Corporate Farming Laws, The "Goldschmidt Hypothesis" and Rural Community Welfare* 10-12 (2002), *available at* http://www.i300.org/I-300%20report.PDF. Another recent study concluded that areas with greater concentrations of family farms produce better health and socioeconomic conditions for children, as compared to areas with greater concentrations of industrial agriculture, which produce worse health and socioeconomic conditions for children. David J. Peters, *Revisiting the Goldschmidt Hypothesis: The Effect of Economic Structure on Socioeconomic Conditions in the Rural Midwest,* Missouri Economic Research and Information Center, P-0702-1 (July 2002), *available at* http:// www.missourifarmersunion.org/conf03/goldschmidt03.pdf.

The United States Department of Agriculture (USDA) similarly has recognized the benefits of family farms:

> Small farms contribute more than farm production to our society. Small farms embody a diversity of ownership, cropping systems, landscapes, biological organization, culture, and traditions. Since the majority of farmland is managed by a large number of small farm operators, the responsible management of soil, water, and wildlife encompassed by these farms produces significant environmental benefits. Decentralized land ownership produces more equitable economic opportunity for people in rural communities, and offers self-employment and business management opportunities. Farms,

> particularly family farms, can be nurturing places for children to grow up and acquire the values of responsibility and hard work.

A Time to Act: A Report of the USDA National Commission on Small Farms 8 (Jan. 1998), *available at* http://www.reeusda.gov/smallfarm/smlfrm1.pdf.

The loss of family farms inevitably leaves rural communities with lower overall incomes and an increase in poverty. *See generally,* Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Services Practitioners*, 29 Clearinghouse Rev. 1087, 1089-91 (April 1996). Rural development experts have estimated that for every five to seven farms that go out of business, one business in the rural community closes. Osha Gray Davidson, *Broken Heartland: The Rise of America's Rural Ghetto* 57 (1990). Loss of competitive markets, lower incomes, increased unemployment, and an increase in poverty rates are of significant interest to the state, since they result in lower state tax revenues and increase a state's burden to respond to its citizens living in poverty. Similarly, degradation of health and socioeconomic conditions for children is undeniably a matter of interest to the state. South Dakota thus has a significant interest in ensuring that its rural communities remain vibrant by preserving the continued existence of independent family farmers. The means South Dakota chose to defend those interests, reasonable restrictions on corporate agriculture, have been shown to be effective. The Eighth Circuit's decision wrongly deprives states of an important tool for fostering healthy rural communities.

II. THE PETITIONS PRESENT IMPORTANT QUESTIONS REGARDING THE REACH OF THE DORMANT COMMERCE CLAUSE

In subjecting Amendment E to strict scrutiny solely because it found evidence of a discriminatory purpose, the

Eighth Circuit failed to follow this Court's prior decisions, and extended the dormant Commerce Clause doctrine beyond the bounds established by this Court's precedent. This expansion of the dormant Commerce Clause doctrine, if left unreviewed by this Court, leaves vulnerable a multitude of state laws concerning agriculture that hitherto have been considered well within the penumbra of legitimate state legislation. Indeed, if the test used by the Eighth Circuit is allowed to stand, and courts invalidate all state legislation enacted with any evidence of a "discriminatory" purpose — *i.e.*, evidence that the legislation is designed to have local benefits — without undertaking the traditional balancing of those benefits with the burden placed on interstate commerce, the result would be a *per se* finding of unconstitutionality of most state legislation. Such a restriction on the states' domain elevates the importance of the questions presented and weighs strongly in favor of granting the present petition.

This Court has long employed a two-step approach in analyzing state regulation of commerce. If a state regulation "discriminate[s] against interstate commerce 'either on its face or in practical effect,'" the regulation will be invalidated unless the state demonstrates "both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); *see also*, *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). If, on the other hand, a regulation "regulates evenhandedly, to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also, Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Whether a state

regulation runs afoul of the dormant Commerce Clause largely depends on whether it falls in the first analytical "tier," subjecting the regulation to strict scrutiny, or whether it will be analyzed under the *Pike* balancing test.

The Eighth Circuit incorrectly applied first "tier" strict scrutiny to Amendment E. The language of Amendment E is neutral on its face. It states in relevant part: "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." S.D. Const. Art. XVII, §21.[5] Amendment E also regulates evenhandedly: it prohibits *all* non-farm corporations, regardless of where they were formed or currently operate, from farming or owning farmland in South Dakota. Because Amendment E discriminates neither on its face nor in effect, the Eighth Circuit should have reviewed it under the second "tier" *Pike* balancing test, as the district court did below.

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[5] By disregarding the nondiscriminatory language of the constitutional amendment entirely, the Eighth Circuit also disregarded one of the most basic tenets of statutory interpretation, namely, that the most reliable source for determining legislative intent is the language of the legislation itself. This Court has observed: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). The Eighth Circuit likewise has emphasized this principle, holding that when "statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative." *Northern States Power Co. v. United States,* 73 F.3d 764, 766 (8th Cir. 1996).

The Eighth Circuit's decision directly conflicts with this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). In an attempt to address problems resulting from vertical integration in the petroleum industry within the state, the Maryland legislature prohibited petroleum producers or refiners from operating retail gas stations in Maryland. This Court upheld the statute, even though there were no producers or refiners in the state and the burden of the prohibition fell solely on out-of-state companies. *Id.* at 125. This Court found that the law treated out-of-state corporations the same as in-state corporations:

> While the refiners will no longer enjoy the same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

Id. at 126. This Court also rejected the argument that the regulation impermissibly burdened interstate commerce, observing that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-28, citing *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794, 806 (1976). Maryland's statute prohibiting producers and refiners from operating gas stations in Maryland thus was upheld as a valid exercise of the state's authority to address problems relating to its gasoline market.

This Court's *Exxon* decision is in line with its other dormant Commerce Clause cases holding that state laws that regulate evenhandedly, even though they have some effect on interstate commerce, must be upheld unless the burden on interstate commerce "clearly outweighs the State's legitimate

purpose." *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (rejecting a dormant Commerce Clause challenge to a Minnesota statute banning the sale of retail milk in plastic, nonrefillable containers because the statute "regulates evenhandedly" by prohibiting all milk retailers from selling such products, and the state had an interest in conserving energy and natural resources); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (upholding an Indiana corporate takeover law that applied to all hostile tender offers even though its application would fall most often on out-of-state companies).[6]

By disregarding Amendment E's neutral language and its evenhanded application, the Eighth Circuit failed to properly balance South Dakota's legitimate interest in choosing the form of agriculture it wishes to promote, reversing the tide of decades of precedent. When courts, including this Court, have considered the states' legitimate interests, they have upheld similar state restrictions on corporate agriculture. *See Asbury Hospital v. Cass County*, 326 U.S. 207, 214-15 (1945) (rejecting an Equal Protection challenge to a North Dakota statute barring all corporations, except cooperatives, from owning farmland, holding the statute is an appropriate application of a state policy against the concentration of farming lands in corporate ownership); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d

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[6] This Court has also noted that the existence of in-state corporations that would be adversely affected is a "powerful safeguard against legislative abuse." *Clover Leaf Creamery*, 449 U.S. at 473 n. 17, citing *South Carolina Highway Dept. v. Barnwell Bros., Inc.* 303 U.S. 177, 187 (1938). South Dakota corporations are just as adversely affected by Amendment E as out-of-state corporations. For example, IBP, until it was acquired by Tyson, was a South Dakota-based company subject to the restrictions in Amendment E just like any other corporation. *See generally*, David R. Moeller, *The Problem of Agricultural Concentration: The Case of the Tyson-IBP Merger*, 8 Drake J. Agric. L. 33 (Spring 2003).

801, 805-06 (Mo. 1988) (rejecting an Equal Protection challenge to Missouri's restriction on corporate ownership of farmland, holding it serves a legitimate state interest and that without the restriction the legislature could not protect traditional farming communities). The Eighth Circuit itself denied an Equal Protection challenge to Nebraska Initiative 300 (after which South Dakota's Amendment E was patterned) that prohibits non-family farm corporations from owning and operating Nebraska farm and ranch land, holding:

> The people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land. It is not for the courts to second-guess the wisdom of this judgment.

MSM Farms, Inc. v. Spire, 927 F.2d 330, 335 (8th Cir. 1991).

Cases in which courts did balance the state's interests in fostering family farms and rural communities when state regulations were challenged under the dormant Commerce Clause have found those interests outweigh any burdens placed on interstate commerce. *See, e.g., Parker v. Brown*, 317 U.S. 341, 362-63 (1943) (upholding California's raisin marketing order "because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities . . ."); *Hampton Feedlot v. Nixon,* 249 F.3d 814, 820 (8th Cir. 2001) (upholding Missouri's livestock price discrimination law, concluding: "The Missouri legislature has the authority to determine the course of its farming economy, and this measure is a constitutional means of doing so. We have no doubt that the state considered the potential harms and benefits to all stakeholders in creating its price discrimination law."); *see also*, *Pacific States Box & Basket Co. v. White*,

296 U.S. 176, 181, 184 (1935) (upholding state regulation of transportation of produce, stating: "The power of a State to proscribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to *prevent unfair competition* is conceded.") (emphasis added).

As demonstrated in Petitioners' briefs and recognized by the district court in this case, South Dakota has legitimate reasons for enacting Amendment E. *See South Dakota Farm Bureau v. Hazeltine*, 202 F. Supp. 2d 1020, 1047 (D.S.D. 2002) (finding the express purpose of Amendment E is "to retain family farms and to prevent limited liability entities, regardless of their home base, from gaining control of the food supply."); *see also, supra,* 6-12. The Eighth Circuit erred by applying first "tier" strict scrutiny to Amendment E, which is neutral on its face and in effect. If allowed to stand, courts will begin to apply the test used by the Eighth Circuit in this case to state regulations that do not discriminate on their face or in effect based on minimal evidence of discriminatory intent, rather than balancing the states' legitimate interests with the burden imposed on interstate commerce. The result would be a significant encroachment on states' interests in enacting what have long been held to be legitimate and constitutional regulations for the health and benefit of their rural communities.

The Eighth Circuit's holding in this case that strict scrutiny could be triggered solely by a finding of discriminatory purpose also expands the reach of the dormant Commerce Clause beyond the boundaries of dormant Commerce Clause jurisprudence as applied by this Court. Citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), the court said that if a law "has a discriminatory purpose," that is an "indicator of discrimination against out-of-state interests," thus triggering strict scrutiny. *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 593 (8th

Cir. 2003). Neither *Bacchus* nor the other cases relied on by the Eighth Circuit have actually applied a strict scrutiny standard based solely on a "discriminatory purpose." In all of those cases, the regulation at issue either discriminated on its face or in effect. *See Bacchus*, 468 U.S. at 271 (regulation was passed with an undisputed discriminatory purpose, but also discriminated on its face and in effect); *Hunt v Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977) (statute had the "practical effect" of discriminating against Washington apple growers and dealers while leaving North Carolina apple producers unaffected); *Waste Sys. Corp. v. County of Martin,* 985 F.2d 1381, 1386-87 (8th Cir. 1993) (ordinance discriminated on its face and in effect); *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995) (referendum discriminated in effect). Indeed, even where there existed evidence that a regulation was passed with discriminatory motives, this Court refused to apply strict scrutiny where the regulation did not discriminate on its face and applied equally to in-state and out-of-state interests. *See Clover Leaf Creamery*, 449 U.S. at 463 n. 7, 466, 471 n. 15.

The Eighth Circuit decision in this case is inconsistent with and expands this Court's dormant Commerce Clause precedent. If left unreviewed by this Court, the test applied by the Eighth Circuit could result in the invalidation of numerous state laws and leave states hamstrung in their attempts to provide for the well-being of their farming communities.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for a writ of certiorari.

Respectfully Submitted,

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THE SOUTH DAKOTA SECRETARY OF STATE AND THE SOUTH DAKOTA ATTORNEY GENERAL,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE STATES OF MINNESOTA, MISSOURI, OKLAHOMA, AND THE COMMONWEALTH OF PUERTO RICO *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* STATES 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Legitimate And Non-Discriminatory State Interests Support State Laws Prohibiting Corporate Farming 3

II. The Eighth Circuit's Commerce Clause Analysis Is Inconsistent With The Directives Of This Court 7

A. The Eighth Circuit's Analysis Of Whether Amendment E Discriminates Against Interstate Commerce Is Flawed 8

B. The Eighth Circuit Did Not Apply The Appropriate Test To Determine The Validity of Amendment E 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Asbury Hosp. v. Cass County, 326 U.S. 207 (1945) 2, 6

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 9

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 9

CTS Corp. v. Dynamics Corp. of Amer., 481 U.S. 69 (1987) 2, 10, 12

Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814 (8th Cir. 2001) 5

Hughes v. Oklahoma, 441 U.S. 322 (1979) 2, 8, 10, 11

Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333 (1977) 9, 11

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 12

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) 9

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 9, 10

MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991) 6

Omaha Nat'l Bank v. Spire, 389 N.W.2d 269 (Neb. 1986) 10

Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994) 7, 8, 11

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ... 2, 3, 8, 11

TABLE OF AUTHORITIES – Continued

Page

State ex rel. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801 (Mo. 1988) 2, 5, 6

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) 8, 9

STATUTES:

7 U.S.C.A. § 2266(a) (1999) 7

Iowa Code Ann. § 9H.4 (2003) 1

Kan. Stat. Ann. § 17-5904 (1995 and Supp. 2002) 1

Minn. Stat. § 500.24 (2002) 1, 3

Mo. Stat. Ann. § 350.015 (2001) 1

N.D. Cent. Code § 10-06.1-02 (2003) 1

Neb. Const. art. XII, § 8 1

Okla. Const. art. 22, § 2 1

S.D. Codified Laws § 47-9A-1 (2003) 1

Wis. Stat. § 182.001 (2002) 1

MISCELLANEOUS:

Family Farm Antitrust Act of 1979: Hearings on S. 334 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 68 (1979) 5

James B. Wadley, *Small Farms: The USDA, Rural Communities, and Urban Pressures*, 21 WASHBURN L. J. 478 (1982) 4, 5

TABLE OF AUTHORITIES – Continued

Page

Jan Stout, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC L. REV. 835 (1996) 5

Rick Welsh and Thomas A. Lyson, *Anti-Corporate Farming Laws, the "Goldschmidt Hypothesis," and Rural Community Welfare* (2002) 4, 7

INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of the States of Minnesota, Missouri, Oklahoma, and the Commonwealth of Puerto Rico in support of the Petition for Writ of Certiorari brought by the South Dakota Secretary of State and the South Dakota Attorney General. In this case, the Eighth Circuit Court of Appeals held that the South Dakota anti-corporate farming law, known as Amendment E, which was adopted in 1998 by South Dakota voters as an amendment to their state constitution, violates the dormant Commerce Clause. Pet. App. 27. Specifically, the Eighth Circuit concluded that Amendment E was motivated by a discriminatory purpose and that Defendants had not satisfied their burden of showing that non-discriminatory alternatives would not advance the interests furthered by Amendment E. Pet. App. 25-27.

The *amici curiae* States and Commonwealth respectfully request this Court to grant the Petition for Writ of Certiorari because the Eighth Circuit's decision involves a question of significant importance to agricultural states, particularly those attempting to protect family farms and their rural communities. If allowed to stand, the Eighth Circuit's decision could have a detrimental impact on similar state laws[1] prohibiting corporate farming. Consequently, the *amici curiae* States and Commonwealth have

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[1] Currently, nine states, including South Dakota, prohibit corporate farming to some extent. *See* Iowa Code Ann. § 9H.4 (2003); Kan. Stat. Ann. § 17-5904 (1995 and Supp. 2002); Minn. Stat. § 500.24 (2002); Mo. Stat. Ann. § 350.015 (2001); Neb. Const. art. XII, § 8; N.D. Cent. Code § 10-06.1-02 (2003); Okla. Const. art. 22, § 2; S.D. Codified Laws § 47-9A-1 (2003); Wis. Stat. § 182.001 (2002).

a strong interest in ensuring that limitations on corporate farming are upheld.

SUMMARY OF ARGUMENT

State laws prohibiting corporate farming enjoy a long history of judicial and legislative recognition based on a state's important and legitimate interest in preventing the corporate takeover of farmland at the expense of independent family farms and the welfare of rural farming communities. *See, e.g., Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801 (Mo. 1988). In analyzing whether Amendment E violates the dormant Commerce Clause, the Eighth Circuit did not consider the strength of the state interests involved. Rather, relying solely on statements made by some of the drafters, the court held that Amendment E was enacted with a discriminatory purpose. Based on its finding that Amendment E discriminated against interstate commerce, the Eighth Circuit concluded that it was unconstitutional under the strict test set forth in *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

Because Amendment E affects in-state corporations in the same manner as it affects out-of-state corporations, it cannot be held to discriminate against interstate commerce in the manner prohibited by the dormant Commerce Clause. *See CTS Corp. v. Dynamics Corp. of Amer.*, 481 U.S. 69, 87 (1987). Where a law, such as Amendment E, regulates even-handedly, its constitutionality under the dormant Commerce Clause is determined through application of the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In holding that Amendment E

discriminates against interstate commerce and in failing to use the *Pike* balancing test to determine Amendment E's constitutionality, the Eighth Circuit's decision is in conflict with the established Commerce Clause jurisprudence of this Court. The Eighth Circuit's decision could open the door to similar challenges of other state anti-corporate farming laws, thus interfering with a state's ability to protect its rural communities and regulate the conduct of corporations within its borders. This potential impact is an important issue warranting granting the Petition for Writ of Certiorari in this matter.

ARGUMENT

I. Legitimate And Non-Discriminatory State Interests Support State Laws Prohibiting Corporate Farming.

Agricultural states have a long history of supporting family farms. For example, as early as 1973, the Minnesota Legislature adopted statutory provisions prohibiting corporate farming within the state of Minnesota. *See* 1973 Minn. L. ch. 427, § 1. The purpose of Minnesota's Corporate Farm Law is set forth in the preamble of the current statute:

> The [Minnesota] legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.

Minn. Stat. § 500.24 (2002).

Agricultural states have a very legitimate concern with the takeover of family farms by corporations, both large and small. The loss of family farms has a proven adverse effect on rural communities. Studies have shown that independent family farms contribute significantly more to healthier rural communities than do corporate farms. *See* Rick Welsh and Thomas A. Lyson, *Anti-Corporate Farming Laws, the "Goldschmidt Hypothesis," and Rural Community Welfare* (2002), at 11.[2] Particularly, research has indicated that as the number of independent family farms declines, the quality of rural life declines, available community services decrease, and the number of schools, churches, and other primary socializing institutions are reduced. *See* James B. Wadley, *Small Farms: The USDA, Rural Communities, and Urban Pressures*, 21 WASHBURN L. J. 478, 497 (1982). In addition, the number of cultural amenities such as parks and playgrounds, the number of independent business establishments, and the number of self-employment opportunities also decline. *Id.* A comparison of a family farm community with an agribusiness town led one expert to conclude:

> Whether we focus on economic, social, or political factors, the traditional virtues of our society are better served in the family farm community than in the agribusiness town. Incomes were on the average higher though more people were supported; business enterprises were both more numerous and more profitable; there were more social amenities such as parks, paved streets, and sewers; there were more schools, clubs, and

[2] A copy of this study is appended to this brief for the Court's convenience.

> churches; there were more local newspapers and formal institutions for local political decision-making. The crucial difference is that in the family farm community, most of the population was self-employed; in the other, two-thirds were agricultural workers.

Family Farm Antitrust Act of 1979: Hearings on S. 334 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 68 (1979) (statement of Walter Goldschmidt), *cited in, Id.* at 499-500.[3]

It is because of this impact on rural farming communities that several agricultural states have enacted laws limiting the role of corporate farming within their states. Such laws have been found to be within the purview of a state's regulatory power. *See, e.g., Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001) ("The Missouri legislature has the authority to determine the course of its farming economy. . . ."); *Lehndorff Geneva, Inc.*, 744 S.W.2d at 806 ("It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens

[3] Additionally, recent experience in states allowing large corporate farming operations demonstrates that states have reason to be concerned with adverse environmental harm associated with such operations, including waste spills and water pollution. *See* Jan Stout, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC L. REV. 835, 848-50 (1996) (discussing the environmental harm experienced in Missouri and North Carolina resulting from large corporate hog farming operations).

comprising its traditional farming community. . . ."). Such laws have also consistently withstood challenges under the Equal Protection Clause, based on findings that such laws are rationally related to a state's legitimate interest in preventing corporate domination of farmland at the expense of independent family farms. *See, e.g., Asbury Hosp.*, 326 U.S. at 214 ("We cannot say that there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a state policy against the concentration of farming lands in corporate ownership."); *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991) (agreeing that a policy seeking to retain and promote family farm operations and avoid the threats of unrestricted corporate ownership of farmland by preventing the concentration of farmland in non-family corporations is a legitimate state interest under the equal protection clause); *Lehndorff Geneva, Inc.*, 744 S.W.2d at 805 ("The statute is rationally related to a legitimate state interest in that it prevents the aggregation of farmland in large corporations to the competitive exclusion of traditional farming entities.").

Congress has also recognized the importance of preserving family farms. Codified in the Agriculture and Food Act is the congressional statement of policy supporting the maintenance of the family farm system of agriculture:

> Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country. Congress believes that the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation and the competitive

> production of adequate supplies of food and fiber. *Congress further believes that any significant expansion of nonfamily owned large-scale corporate farming enterprises will be detrimental to the national welfare.*

7 U.S.C.A. § 2266(a) (1999) (emphasis added).

Anti-corporate farming laws are not only supported by a long history of judicial and legislative recognition as to their legitimate purposes, but also have had the effect of furthering those purposes. Specifically, the Welsh and Lyson study found that farming communities in states with anti-corporate farming laws have lower relative poverty levels, lower levels of unemployment, and higher percentages of farms reporting cash gains, than do farming communities in states without such laws. Welsh and Lyson, *supra*, at 11.

II. The Eighth Circuit's Commerce Clause Analysis Is Inconsistent With The Directives Of This Court.

The Commerce Clause, although phrased as an affirmative grant of regulatory power to Congress, "has long been understood to have a 'negative' aspect that denies States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). The analysis this Court undertakes to determine whether a state law violates this negative aspect of the Commerce Clause is well established. The first step is to determine whether the challenged law "'regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate

commerce.'" *Id.* at 99 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). If the law discriminates against interstate commerce, "it is virtually *per se* invalid." *Id.* On the other hand, a nondiscriminatory law that has only incidental effects on interstate commerce will be upheld unless "'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The Eighth Circuit incorrectly concluded that Amendment E discriminates against interstate commerce. Further, because of this erroneous conclusion, the court failed to consider whether any burden imposed on interstate commerce was incidental when compared to Amendment E's local benefits. The Eighth Circuit's decision, therefore, is contrary to the established Commerce Clause jurisprudence of this Court.

A. The Eighth Circuit's Analysis Of Whether Amendment E Discriminates Against Interstate Commerce Is Flawed.

In its analysis of whether Amendment E discriminates against interstate commerce, the Eighth Circuit focused primarily on statements made during the drafting process by some proponents to conclude that Amendment E had a discriminatory purpose.[4] Pet. App. 18-23. In doing so, the

[4] Further, while the *amici curiae* States and Commonwealth do not agree that the drafters of Amendment E had a discriminatory purpose, even if they did, a discriminatory purpose alone is insufficient to invalidate Amendment E. Rather, Amendment E must also have a discriminatory effect. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512

(Continued on following page)

court completely ignored the plain language of the Amendment. As the Supreme Court of Nebraska stated when considering a challenge to Nebraska's anti-corporate farming constitutional amendment:

> There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment . . . we must consider the words of the initiative petition . . . and the words actually voted on and adopted by the voters. Any other approach would only be a selective choice, made by a reviewing court, of diametrically opposed allegations made by those favoring or opposing the enactment . . . it is impossible to divine the intent of myriad voters who adopt a constitutional amendment.

U.S. 186, 194 (1994) (finding discrimination based on a pricing order's "avowed purpose and its undisputed effect"); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (invalidating an ordinance based on its "practical effect and design"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (concluding that a liquor tax violated the Commerce Clause "because it had both the purpose and effect of discriminating in favor of local products"); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37, 42 (1980) (finding a statute discriminates based "both on its face and in actual effect," and noting that "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects."); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-53 (1977) (finding discrimination based on the practical effect of the statute, and therefore not reaching the issue of whether it was intended to discriminate); *cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981) (rejecting a discriminatory purpose argument based on a finding that the articulated purpose of the law was its actual purpose).

Omaha Nat'l Bank v. Spire, 389 N.W.2d 269, 279 (Neb. 1986) (citations omitted).

Simply put, Amendment E does not affect out-of-state corporations any differently than in-state corporations. Rather, Amendment E "'visits its effects equally upon both interstate and local business.'" *CTS Corp.*, 481 U.S. at 87 (citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980)). As a result, it does not discriminate against interstate commerce. *See Id.* (finding that an Indiana statute imposing requirements on tender offers was nondiscriminatory because it had that same effects on tender offers whether or not the offeror was a domiciliary or resident of Indiana). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (concluding that a Minnesota statute prohibiting all milk retailers from selling milk in certain containers, "without regard to whether the milk, the containers, or the sellers are from outside the State" did not discriminate against interstate commerce).

While Amendment E admittedly has some burden on interstate commerce, it treats all business organizations alike regardless of their domicile. Pursuant to this Court's established Commerce Clause jurisprudence, Amendment E cannot, therefore, be found to discriminate against interstate commerce.

B. The Eighth Circuit Did Not Apply The Appropriate Test To Determine The Validity of Amendment E.

Based upon its finding of discrimination, the Eighth Circuit applied the strict test of *Hughes v. Oklahoma*, 441 U.S. 322 (1979), to determine the constitutionality of

Amendment E. Pet. App. 18. *Hughes* places the initial burden of proving that a challenged law is discriminatory on the party challenging its validity, 441 U.S. at 336. Once discrimination against interstate commerce is established, the burden shifts to the state to justify the law "'both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Id.* (quoting *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977)). This Court has deemed this test to be one of "strictest scrutiny." *Oregon Waste Sys., Inc.*, 511 U.S. at 101.

The Eighth Circuit's reliance on this test was misplaced. While Amendment E has an impact on interstate commerce, its application is even-handed, applying to both in-state and out-of-state corporations. As there is no discrimination in the Amendment's application, the appropriate test to be applied to determine the constitutionality of Amendment E is that set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Pike* instructs that:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 143 (citation omitted).

Had the Eighth Circuit applied this *Pike* balancing test to Amendment E, the court would have had to consider the important and substantial state interests involved. In determining whether a state law imposes an excessive burden on interstate commerce, a court must consider that the Constitution "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens," even if the law indirectly affects interstate commerce. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960). Rather, "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce . . . may constitutionally stand." *Id.* at 448. Like the air pollution ordinance upheld in *Huron*, Amendment E is "a regulation of general application, designed to better the health and welfare of the community." *Id.* Amendment E, applicable to all corporations regardless of location, is designed to better the health and welfare of rural family farm communities by protecting residents from the social, economic, and environmental harms associated with the presence of large farming corporations.

The Eighth Circuit should also have considered "the significance for Commerce Clause analysis of the fact that state regulation of [corporations] is regulation of entities whose very existence and attributes are a product of state law." *CTS Corp.*, 481 U.S. at 89. State laws regulating corporations by prohibiting certain activities "necessarily affect aspects of interstate commerce." *Id.* at 90. The Eighth Circuit's failure to even consider this important factor will have a very detrimental impact on a state's ability to regulate the conduct of corporations conducting business within the state.

CONCLUSION

The Eighth Circuit's decision in this case is in conflict with the established dormant Commerce Clause jurisprudence of this Court. This is an issue of exceptional importance which warrants the granting of the Petition for Writ of Certiorari.

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Anti-Corporate Farming Laws, the "Goldschmidt Hypothesis" and Rural Community Welfare

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Executive Summary

A tremendous amount of attention and research has been devoted to the impacts of farm scale on rural communities. The majority of this research follows in the "Goldschmidt" tradition. Walter Goldschmidt is an anthropologist who in the 1940s made the finding that communities surrounded by large-scale farms faired

poorly, in a number of important social indicators, when compared to communities surrounded by small-to-moderate sized farms. Since Goldschmidt's research, a plethora of studies have been undertaken to attempt to replicate or refute his findings. The "follow-up" studies employ a diverse set of methodologies, data sets, units of analysis and variables. However, in general, the majority of the studies provide at least some support for Goldschmidt's original findings.

The impetus behind Goldschmidt's original research and subsequent studies is the effort to understand the nature and impacts of structural change in U.S. agriculture. Since early in the 20th century, U.S. agriculture has been increasingly characterized by a loss in farm numbers, increasing average farm size, increasing use of hired labor on farms, vertical integration of farming with off-farm businesses and upsurges in contract farming. These changes have been uneven across time and place, but in general have characterized the development of U.S. agriculture in the 20th and early 21st centuries, and have caused some observers to argue that agriculture is "industrializing".

In addition to generating academic research, concerns over structural change in U.S. agriculture have also generated public policies. For example, nine Midwestern states have adopted laws that restrict corporate involvement in agriculture. The nine states are Iowa, Kansas, Minnesota, Missouri, North Dakota, Oklahoma, South Dakota and Wisconsin. The laws were primarily put into place between 1974 and 1975 for all states but Nebraska. Nebraska's constitutional amendment (Initiative 300 or I-300) restricting corporate agriculture was adopted in 1982. The laws, called anti-corporate farming laws, vary from

state to state but in general are intended to hobble or restrict corporate involvement in agriculture in order to protect family farm agriculture.

Anti-corporate farming laws are not necessarily intended to slow down or stop many of the changes occurring in U.S. agriculture. For example, the laws do not address issues around hired labor or increasing scale of the farming units in general. Rather, the laws are designed to regulate or proscribe the entry of particular types of organizational forms based on ownership arrangements, most commonly non-family corporations, into production agriculture. This is accomplished through actions such as restrictions or regulations on ownership of farmland or downward vertical integration of livestock processing with production. It is often thought that unincorporated farming units might find it difficult to compete with incorporated farming units, because the latter enjoy liability advantages and possibly advantages in other areas such as acquiring financing and paying taxes. Our purpose in this study is to investigate what impacts, if any, these anti-corporate farming laws have had on rural communities.

We examine agriculture dependent counties, which we define based on two criteria: first, at least 75 percent of the total land in a county had to be in farms in 1982 and 1992; second, at least 50 percent of total gross receipts for goods and services in the county needed to originate from agricultural sales in 1982 and 1992. These measures were derived from the 1982 and 1992 Censuses of Agriculture and variables from the 1982 and 1992 Economic Censuses. There are 433 counties that fit these criteria. The states and counties included in the analysis are listed in the Appendix section at the end of this report.

To test the impacts of the anti-corporate farming laws we construct two variables: a binary variable for whether a state has such a law or not; and a restrictiveness index that allows us to compare states with more restrictive laws to those with less restrictive laws. In addition, a number of control variables are included in the analysis. The controls are used in order to attempt to isolate the effects of the variables of interest: in this case the anti-corporate farming variable impacts on rural community welfare. The control variables are those variables that might be considered as important determinants of rural community welfare and have to be included in order for an analysis to rigorously attempt to test for relationships of interest. Rural community welfare is measured by three variables: percent of families in poverty, percent unemployed and percentage of farms in a county realizing cash gains.

In addition, we use data from the 1982 and 1992 Censuses of Agriculture to construct a measure of large scale, absentee owned (industrial style) farming in a county. We label this measure the farm scale factor and include it in the analysis primarily as a control variable but also to inform the scholarship in the Goldschmidt tradition. However, our analysis of industrial farming or farm scale relative to rural community welfare differs from previous analyses since we test to determine if lower and higher levels of industrial farming, as measured by the farm scale factor, have differing impacts on rural community welfare.

The results of the analysis indicate that, in general, agriculture dependent counties in states with anti-corporate farming laws fared better (less families in poverty, lower unemployment and higher percentages of

farms realizing cash gains) than agriculture dependent counties in states without such laws. When we compare states with more restrictive anti-corporate laws to states with less restrictive laws, the results are similar, though much less consistent, to comparing states with laws to states without laws.

The results also suggest that rural communities tend to benefit from lower levels of agricultural industrialization but might fare poorly as agricultural industrialization intensifies and begins to dominate a county's agriculture. We conclude that diversity in agricultural structural forms at the county level appears to have positive impacts on rural communities as measured by poverty, unemployment and farm cash returns. Counties appear to require some agricultural industrialization to prosper but suffer when this type of agriculture crowds out less industrialized forms.

A public policy intervention that promotes organizational and structural diversity in agriculture would seem to be needed. In this vein, anti-corporate farming laws provide one model. These laws vary across states but in general have been designed to attempt a balance between allowing for economic flexibility of farm firms and protecting family-based agriculture. The laws are designed to allow farm firms to incorporate but only under certain restrictions and limitations. Some laws restrict the number of shareholders, other laws require that at least one owner also regularly work on the farm, and still others restrict the ability of certain types of corporations to feed livestock. There are of course other models for regulating industrial agriculture and for providing sheltering institutions for less industrialized forms. However, the relatively

extensive experience U.S. agriculture has had operating with such laws; and the fact that the laws appear to have had some of the beneficial impacts that their authors and proponents intended, make the laws interesting and thought provoking starting points for public policy development and debate concerning the realization of widespread and sustainable benefits from U.S. agriculture.

Introduction

A tremendous amount of attention and research has been devoted to the impacts of farm scale on rural communities. This subject has been a favorite of rural sociologists. The majority of the research follows in the "Goldschmidt" tradition. Walter Goldschmidt is an anthropologist who in the 1940s made the finding that communities surrounded by large-scale farms faired poorly, on a number of important social indicators, when compared to communities surrounded by small-to-moderate sized farms. Since Goldschmidt's research (1946/1978), a plethora of studies have been undertaken to attempt to replicate or refute his findings (Buttell, Larson and Gillespie, 1990; Lobao, 1990; Lyson, Torres and Welsh, 2001). The "follow-up" studies employ a diverse set of methodologies, data sets, units of analysis and variables. However, in general, the majority of the studies provide at least some support for Goldschmidt's original findings (Lobao, 1990; Lyson, Torres and Welsh, 2001).

The impetus for Goldschmidt's original research and the later studies is the effort to understand the nature and impacts of structural change in U.S. agriculture on rural communities. Since early in the 20th century, U.S. agriculture has been increasingly characterized by a loss in farm

numbers, increasing average farm scale, increases in the use of hired labor on farms, vertical integration of farming with off-farm businesses and upsurges in contract farming (Lobao, 1990). These changes have been uneven across time and place, but in general have characterized the development of U.S. agriculture in the 20th and early 21st centuries and have caused some observers to argue that agriculture is "industrializing" (Lobao, 1990; Welsh, 1996). The potential for industrial style farming to displace the traditional family-labor farm with other organizational forms, has caused public concern within and outside rural America.

In addition to generating academic research, concerns over structural change in U.S. agriculture have also generated public policies. For example, nine Midwestern states have adopted laws that restrict corporate involvement in agriculture. The nine states are Iowa, Kansas, Minnesota, Missouri, North Dakota, Oklahoma, South Dakota and Wisconsin (Pedersen and Meyer, 1995). The laws were put into place primarily between 1974 and 1975 for all states but Nebraska. Nebraska's constitutional amendment (Initiative 300 or I-300) restricting corporate agriculture was adopted in 1982. The laws, called anti-corporate farming laws, vary from state to state but in general are intended to hobble or restrict corporate involvement in agriculture in order to protect family farm agriculture (Powers, 1993; Welsh, Carpentier and Hubbell, 2001). For example, Minnesota's anti-corporate farming law specifically states that it is in the interests of the state to promote and protect:

> "the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and

> promote the stability and well-being of rural society in Minnesota and the nuclear family."

Anti-corporate farming laws are not necessarily intended to slow down or stop many of the changes occurring in U.S. agriculture. For example, the laws do not address issues around hired labor or increasing scale of the farming units in general. Rather, the laws are designed to regulate or proscribe the entry of particular types of organizational forms based on ownership arrangements, most commonly non-family corporations, into production agriculture. This is accomplished through actions such as restrictions or regulations on ownership of farmland or downward vertical integration of livestock processing with production (Welsh, 1998). The idea behind these policies is that unincorporated farming units might find it difficult to compete with incorporated farming units because the latter enjoy liability advantages and possibly advantages in other areas such as acquiring financing and paying taxes (Welsh, 1998).

Despite the plethora of research on industrialization of agriculture and its impact on rural communities, we could find no attempts to integrate data on public policy initiatives intended to blunt or regulate industrial agriculture into such research. Our purpose in this study is to begin to address this hole in the research in the Goldschmidt tradition. Specifically we intend to investigate whether anti-corporate farming laws have had positive or negative effects on rural communities. To accomplish this we first present a discussion of research in the Goldschmidt tradition, followed by a brief analysis of the structure and content of anti-corporate farming laws. Following this, we use data from the U.S. Census of Agriculture, the U.S. Census, and from a mail survey of

agricultural lawyers to discern if anti-corporate farming laws have had any impacts on rural communities in agriculture dependent counties; and if so, the nature of the impact.

The Goldschmidt Hypothesis

In the mid-to-late 1940s, a U.S. Senate Special Committee commissioned research to explore the potential relationship between the concentration of economic power at the community level and the social and economic well being of rural/farming residents and communities (Goldschmidt, 1946/1978; Lyson, Torres and Welsh, 2001). In his report to the U.S. Senate, *Small Business and the Community*, Walter Goldschmidt (1946) compared and contrasted "communities of large and small farms" in California; Arvin and Dinuba. According to Goldschmidt's description, Arvin was a community dominated by farms substantially larger than those found in Dinuba, the community surrounded by smaller farms. Goldschmidt argued that ". . . the differences between average farm size are great – in the neighborhood of 9 to 1 when taken on an acreage basis, 5 to 1 in value of products, and 3 to 1 if adjusted for intensity of operations. Nine-tenths of all farm land is operated in units of 160 acres or more in Arvin as against one fourth in Dinuba." However, Arvin and Dinuba were similar in other characteristics including population size, shared value systems and social customs and were " . . . part of a common system of agricultural production, best understood as industrialized" (Goldschmidt, 1978:393; see also Lyson, Torres and Welsh, 2001). Goldschmidt believed that a comparison of the relationship between the agricultural structure and the

community welfare of the two communities would be informative.

Goldschmidt concluded from his research findings that residents of Arvin realized a lower standard of living and quality of life than residents in Dinuba; a fact attributable to the difference in the agricultural structure surrounding the two communities. For example, he wrote that, "The reported differences in communities may properly be assigned confidently and overwhelmingly to the scale of farming factor" (Goldschmidt, 1978:284; Lyson, Torres and Welsh, 2001).

Lobao (1990:65) reviewed twenty-six studies that followed Goldschmidt. She found that " . . . about half of the twenty-six studies support Goldschmidt and another nine have mixed findings." Regarding the latter set of studies, some researchers have found that the Goldschmidt findings are supported in certain parts of the U.S., but not in other regions. For example, Lobao (1990:58) reports that in California, Texas, Arizona, Florida, other parts of the West, and the Great Plains, research tends to find support for Goldschmidt. However, in the South, Northeast and the Corn Belt research is less likely to support Goldschmidt. In addition, Lobao (1990) goes on to argue that further research in the Goldschmidt tradition should include a longitudinal (over time) component in addition to cross-sectional analysis, and account for the degree of agricultural dependency of a county or community. Outcomes for agriculture dependent counties are more likely to be linked to surrounding farm structure than non-dependent counties.

Anti-Corporate Farming Laws

Anti-corporate farming laws primarily restrict corporations and other investment type organizations from engaging in farming. The restrictions are generally applied to non-family corporations and limited partnerships (Pedersen and Meyer, 1995). Family corporations are often exempted from the laws if they have certain characteristics. These characteristics might include a maximum number of unrelated (non-kin) shareholders or at least one shareholder living and working on the farm (Pedersen and Meyer, 1995). Additionally, family farm corporations might have to earn a minimum percentage of their gross income from farming in order to be permitted to engage in farming (Welsh, 1998). If a farm is the type of corporation that is not proscribed, or not a scrutinized entity (e.g., general partnership, sole proprietorship), then there are no restrictions placed on the farm (Pedersen and Meyer, 1995). Also, it is important to note that Pedersen and Meyer (1995:45) found that anti-corporate farming laws often exempt certain types of commodities. In their words: "The vertically integrated poultry sector may be tolerated, while the same state may ban the vertically integrated hog industry." This latter finding is probably due to the fact that the poultry industry had vertically integrated prior to the establishment of the laws. It might have been considered overreaching, impractical or counter productive to impose corporate restrictions on poultry given its structure in the 1970s.

If a business is not authorized then a number of restrictions can apply. For example, there may be restrictions on the amount of farmland that can be owned (Dahl, 1991). In addition, other activities could be restricted under the laws. For example, Iowa's anti-corporate

farming law bans packer feeding of livestock (Hamilton, 1995). Generally the laws limit the flexibility of corporations to vertically integrate and expand operations. The intent of the laws is to hobble or discourage the development of a non-family based corporate agriculture and to retain an agricultural industry that is dominated by family owned and operated production units.

Over time there have been some efforts to relax or rescind the laws (see Hamilton, 1995; Pedersen and Meyer, 1995; Powers, 1993). Structural change in U.S. agriculture, especially livestock agriculture, toward a larger-scale vertically coordinated form has brought with it pressure to allow greater flexibility for agribusiness firms in Midwestern states to move toward the poultry model of vertical integration (Thu and Durrenburger, 1998). Efforts to convince state legislatures, or the citizens, of states with anti-corporate farming laws to relax the laws have often been met with resistance by individuals and groups (Welsh, 1998). Because of these conflicting interests and desires, the outcome of efforts to either relax the laws or strengthen them has been mixed. In 1991, Oklahoma "clarified" its laws to allow corporations to have more flexibility. Missouri exempted three counties from its law in 1993 and Kansas allowed for county exemptions to its law beginning in 1995. On the other hand, South Dakota strengthened its law in 1988 (Hamilton, 1995) and again in 1998 through popular referendum (WORC, 1998). Welsh, Carpentier and Hubbell (2001) have demonstrated that making changes in the laws can influence outcomes such as changes in the percentage of acres owned by non-family farm corporations.

What is apparent from the various efforts to change the laws is that those parties in favor of, and opposed to,

corporate involvement in agriculture believe the laws have some relevant impacts. Otherwise it would not be rational action to either oppose or support the laws. In addition, it is clear from the complexity of the laws and the detail in which those entities to be regulated or proscribed are characterized, that the laws are constructed carefully with a great degree of purpose. Incorporation is allowed but only under certain conditions. Likewise, absentee ownership is permitted but limited. The architects of the laws have attempted to allow economic flexibility on the part of firms to grow and expand, but to limit the degree to which production agriculture departs from the family-farm model (Welsh, 1998).

Materials and Methods

We examine agriculture dependent counties (cf Cook and Mizer, 1995) which we define based on two criteria: first, at least 75 percent of the total land in a county had to be in farms in 1982 and 1992; second, at least 50 percent of total gross receipts for goods and services in the county needed to originate from agricultural sales in 1982 and 1992. These measures were derived from the 1982 and 1992 Censuses of Agriculture and variables from the 1982 and 1992 Economic Censuses.[1] There are 433 counties that fit these criteria (see Lyson, Torres, and Welsh, 2001). The states and counties included in the analysis are listed in the Appendix section at the end of this manuscript. Of the 433 counties, 292 are in states with anti-corporate farming laws.

In addition, we use data from the 1982 and 1992 Censuses of Agriculture to construct a measure of large scale, absentee owned farming in a county. For 1982, we

combine the following three variables: 1) the percentage of agricultural sales in a county accounted for by farms with sales of $500,000 or more; 2) the percentage of farm operators in a county that reside off-farm; and 3) the percentage of tenant farms in a county. A principal components analysis shows that the three variables together form one factor that accounts for over 50 percent of the variance, with an eigenvalue of 1.51. Eigenvalues of greater than 1.0 indicate that a factor is statistically significant (Table 1).

For the 1992 cross-sectional analysis, we use the same three variables, but add a fourth variable (not available in the 1982 Census of Agriculture) that taps the percentage of hired farm labor (of all hired farm labor) on the largest farms in the county. This variable adds a labor intensity component to the factor scale. This factor accounts for 52.35 percent of the variance and has an eigenvalue of 2.1. For both scales, a high factor score is associated with counties characterized by large-scale, industrial-like farm operations, while a low factor score is associated with counties in which smaller-scale, family-type farms predominate (Lyson, Torres and Welsh, 2001). We chose these variables in order to construct an index that reflects the rhetoric of family farm advocates. That is, individuals and groups that are likely to favor anti-corporate farming laws and family-based agriculture, are also likely to hold Jeffersonian ideals regarding the primacy of small-to-moderate sized family *owned and operated* farms (see Hamilton, 1996; Welsh, 1998).

In our analyses we use a quadratic form of this variable. We include the factor score (labeled as "farm scale") and then we include the square of the factor score (labeled

as "farm scale[2]"). A quadratic tests for potential differential impacts of higher and lower values of a variable. In our case we will test whether high levels of agricultural industrialization have a different impact on rural community welfare than lower levels.

To probe for differences between large-farm and small-farm communities, Goldschmidt identified a variety of measures of socioeconomic welfare including income distribution, housing conditions, and a general level of living index. To measure rural community welfare we use two frequently employed measures that reflect aspects of community economic health (Horn, 1993; OECD, 1997), and a third variable that measures overall farm economic performance in a county. The community economic health measures are for (circa) 1980 and (circa) 1990 and come from machine-readable data files, CO-STAT 4 (U.S. Bureau of the Census, 1992). The two measures are 1) percent of families in poverty; and, 2) unemployment rate (three year average).[2] The farm economic performance variable is the percentage of farms reporting cash gains in the county, and is derived from the Census of Agriculture for 1992 (see Lyson, Torres and Welsh, 2001).

Our analysis differs from Goldschmidt's in a number of important ways. For example, he reported differences in mean percentages or absolute levels in order to discern the impacts of farm scale on community welfare. However, we attempt to parallel Lobao (1990) and use both cross-sectional and lagged panel linear regression analyses (Ordinary Least Squares[3]) to investigate whether anti-corporate farming laws are associated with community welfare (see Lyson, Torres and Welsh, 2001). The cross-sectional analyses regresses the set of community welfare variables circa 1990 on a measure of farm scale derived

from the 1992 Census of Agriculture, anti-corporate farming law variables and important control variables taken from the Census of Agriculture and the U.S. Census.

In a lagged panel design, independent variables are measured at points earlier in time than the dependent measures. Additionally, lagged panel models also include dependent variables measured at earlier points in time as explanatory variables. The inclusion of a lagged panel design in conjunction with a cross-sectional analysis is more rigorous than cross-sectional analysis alone, since lagged panel analysis provides an assessment of the effects of farm scale and anti-corporate farming laws on *changes* in community welfare over time. In the lagged panel analyses, we use dependent variables from the 1990 cross-sectional analyses and regress them on independent measures circa 1980 (see Lyson, Torres and Welsh, 2001).

To assess the impact of the anti-corporate farming laws we construct two variables: 1) a binary variable for whether a county is within a state with an anti-corporate farming law (1 = anti-corporate state; 0 = otherwise); and 2) a restrictiveness index that rates the overall restrictiveness of a state's law. To construct the restrictiveness index we surveyed agricultural lawyers deemed by their peers as experts on anti-corporate farming laws. To obtain the names of the agricultural lawyers, we initially identified knowledgeable informants and queried them as to a list of experts. Each of these experts were subsequently contacted and asked for a list of experts. This iterative process continued until a "core" group of 19 experts were identified. This type of purposive sampling is a common qualitative research methodology. It is useful for identifying and gathering data from small groups of people with

specialized knowledge, experiences or insight (Patton, 1990). Nineteen surveys were mailed and 15 complete and usable surveys were returned. The surveyed lawyers worked in private practice, academia and non-governmental organizations interested in agricultural policy. Respondents rated the laws from 1 to 5 for each year the laws were in effect from 1974 to 1997. This time period was chosen to coincide with the establishment of the laws (all laws were in place by 1975 except for Nebraska's in 1982). Lower ratings indicate less restrictiveness. The results are the weighted averages of the respondents' ratings for each state (see Welsh, Carpentier and Hubbell, 2001). Restrictiveness ratings corresponding to Census of Agriculture years (1982 and 1992) were included as explanatory variables.

The results of the survey are reported in Table 1. The agricultural lawyers rated most of the laws as mildly to fairly restrictive. No laws were rated as very restrictive, and two of nine state laws were rated as at least fairly restrictive over the life of their laws: Nebraska and North Dakota. In addition, Table 1 indicates that over time the perceived restrictiveness of the laws in general has declined slightly and there has been increasing variation between state laws. For example, the restrictiveness ratings of Missouri, Oklahoma and Kansas declined to reflect changes made by the state legislatures. Specifically, Oklahoma's "clarification" of its law to attract corporate investment resulted in its rating dropping from 2.7 to 1.8 from 1990 to 1991. Contrariwise, South Dakota strengthened its law in 1988, which was also reflected by an increase in the average rating from 1987 to 1988: 2.7 to 3.0 (see Welsh, Carpentier and Hubbell, 2001).

The analysis is divided into two steps. We initially consider the full data set and include only the binary anti-corporate farming law variable. We then analyze only those counties within anti-corporate states and include the restrictiveness rating variable in place of the binary variable. The initial analysis assesses the effect of the presence of a state anti-corporate farming law. The second step compares the effect of the relative restrictiveness of the state laws.

In addition, a number of control variables are included to account for other possible factors influencing the community welfare variables. The control variables included in the analysis are:

- Percent college educated
- Median family income
- County population
- Natural log of percent of population that are Native Americans
- Natural log of percent of population that are Black Americans
- Percent of state workforce that is unionized
- County level control for agricultural region.

The natural logarithms of several independent variables are calculated to correct for skewness in the data. Control variables are included in an attempt to isolate the effects of the variable of interest: in this case the anti-corporate law variables on community welfare. In this case, controls were included that would likely be seen as potentially influencing poverty and unemployment rates at the county level, as well as percent of farms earning cash gains. For

example, it is often found that Native and Black American populations endure higher poverty rates and higher unemployment rates than other groups. Therefore, controlling on these variables adds confidence that the impact of the laws has been measured and not other influences that might be contained within states with anti-corporate farming laws.

Regarding agricultural region, the Economic Research Service of the U.S. Department of Agriculture has developed county-level region variables. These regional variables have been developed to identify " . . . areas with similar types of farms intersected with areas of similar physiographic, soil, and climatic traits, as reflected in USDA's Land Resource Regions" (ERS). We control on two regions: 1) "Heartland" region that primarily entails the Corn Belt; and, 2) "Prairie Gateway" region that primarily entails Texas, Oklahoma and Nebraska. Controlling on agricultural region is necessary for studies that investigate outcomes related to agricultural structure.

Results

The results for the full data set (all states) are presented in Table 4 (family poverty dependent variable), Table 5 (percent unemployed dependent variable), and Table 6 (percent of farms reporting cash gains dependent variable). The results for the subset of states (anti-corporate states) are presented in Tables 7, 8 and 9. Because all states except Nebraska had the laws enacted by 1975, (Nebraska's was not adopted until 1982), we place greater weight on the cross-section results when comparing differences between the restrictiveness of the states' laws. By 1982 it is unlikely that sufficient time had

passed for the differences between the laws to result in different outcomes for agriculture dependent communities in states with anti-corporate farming laws. However, the results for all analyses are included in the tables.

Turning first to the full analysis, for family poverty, the anti-corporate state binary variable is negative and significant in the cross section and lagged panel analyses. This indicates that farming dependent counties in states with anti-corporate farming laws have lower relative poverty levels than farming dependent counties in states that do not have anti-corporate farming laws. A similar result is obtained for unemployment in both the cross-section and lagged panel analyses. Anti-corporate states are associated with lower levels of unemployment at the county-level. For the percent of farms reporting cash gains, the anti-corporate states are associated with higher percentages of farms reporting cash gains at the county-level.

Considering the impacts of the "farm scale" (lower levels of industrialization) and "farm scale^{2}" (higher levels of industrialization) variables, the results are mixed. The "farm scale" variable is positively associated with higher unemployment and percent of farms reporting cash gains in the lagged panel analysis. The "farm scale^{2}" variable is positively associated with higher levels of family poverty and higher unemployment in the cross sectional analyses.

For the analysis among the subset of states with anti-corporate farming laws, the restrictiveness index has no effect on poverty in the cross-section analysis, and a slight positive association with poverty in the lag panel analysis. The index also has a strong negative association with unemployment and a positive association with percent of

farms reporting cash gains in the cross section analysis. That is, agriculture dependent counties in states with stricter anti-corporate farming laws are likely to have lower unemployment and a higher percentage of farms that reported cash gains than agriculture dependent counties in states with less strict laws. We find no relationship between restrictiveness and percent unemployed and percent farms reporting cash gains in the lag panel analysis.

Turning to the scale of farm variables, we find a negative relationship between "farm scale" and poverty and unemployment and a positive relationship with percent of farms earning cash gains. The "farm scale^{2}" variable is positively associated with poverty and unemployment and percent of farms reporting cash gains.

Discussion and Conclusions

In general, the results indicate that some economic flexibility regarding the components of industrial agriculture are beneficial to agriculture dependent rural communities. However, there appears to be a ceiling on the beneficial effects of agricultural industrialization, and beyond a certain level, the impact turns negative. The results suggest that diversity in agriculture structure could be a vehicle for sustaining agriculture dependent communities.

Regarding the role of anti-corporate farming laws, we find that the laws are likely to have been beneficial to rural communities. Agriculture dependent counties in states that restrict or regulate corporate agriculture are more likely to score higher on the measures of community well being than states without such laws. Also, when

comparing anti-corporate farming states to each other, stricter laws are, for the most part, likely to either have had no impact or positive impacts on the socio-economic welfare of agriculture dependent counties.

The farm scale and anti-corporate law results provide similar messages regarding farm structure and rural community welfare. Both indicate that economic flexibility regarding aspects of agricultural industrialization is needed to promote healthy rural communities. However, there is also a need to limit the degree to which industrialization and the corporate penetration of agriculture occurs. The key question raised by our analysis is to what degree should public policy attempt to promote family-based agriculture *and* allow for firm flexibility in the direction of corporate organization in order to maximize community benefits? In this vein, anti-corporate farming laws provide one model since they have been designed to balance economic flexibility of farm firms with the protection of family-based agriculture. There are of course other models for regulating industrial agriculture, and for providing sheltering institutions for less industrialized forms of agricultural production (Castle, 1998). However, the relatively extensive experience U.S. agriculture has had operating with such laws; and the fact that the laws appear to have had the beneficial impacts that their authors and proponents intended, make the laws interesting and thought provoking starting points for public policy development and debate concerning the realization of widespread and sustainable benefits from U.S. agriculture.

Another important question to be answered with future data is the impact changes in the laws have had on the community health indicators we investigated. Our

analysis is historical in that we have only been able to consider data from circa 1980 and circa 1990. Through the nineties the laws have been altered and later Census data should reveal the impacts of those changes.

Notes

1. The U.S. Department of Agriculture has constructed a typology of U.S. counties in which "farming dependent" is one type. The USDA defines farming dependent counties as nonmetropolitan counties in which farming contributed a weighted annual average of 20 percent or more of total labor force and population income over the three years from 1987 to 1989. Because farm-related incomes are generally low, we felt a better measure of agricultural dependency should focus more on the economic and geographic scope of the farming enterprise and not on the income farming generates.

2. The three-year averages for this and subsequent variables are for 1991, 1992, and 1993 for the cross sectional and lagged panel dependent variables and for 1981, 1982, and 1983 for the lagged panel regressors.

3. For analyses of data with two-levels (in this case county and state levels), Ordinary Least Squares can have certain limitations. An alternative approach is to use Hierarchical Linear Modeling (HLM) techniques (see Bryk and Raudenbush, 1992). However, the power of HLM techniques may be limited for data sets with less than thirty groups with thirty observations in each group (in this case counties within states) (see Hofmann, Griffin and Gavin, 2000). Our data set consists of about 20 states with a wide variation in county

numbers (some with as few as one county per state). We opted to report OLS results, however, for those states with at least 10 counties we performed cross-section HLM analyses as a check on our OLS results. The HLM results indicated that on average, and net of controls, agriculture dependent counties in states with anti-corporate farming laws had lower poverty rates and unemployment and higher percentages of farms earning cash gains.

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